TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 693.

JOSEPH A. THATCHER AND JOSEPH STANDLEY, PLAINTIFFS IN ERROR,

vs.

WATSON B. ROCKWELL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

FILED OCTOBER 16, 1880.

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1 **In the supreme court of the State of Colorado.**

Pleas begun and continued in the supreme court of the State of Colorado, at the court-house in the city of Denver, at the December term, A. D. 1877, of said court. Present, honorable Henry C. Thatcher, chief justice; honorable Samuel H. Elbert, associate justice; Hon. Wilbur F. Stone, associate justice; David J. Cook, esq., sheriff of Arapahoe County, by James A. Miller, bailiff of said court; Keyes Danforth, clerk.

2 STATE OF COLORADO,
County of Gilpin, ss:

Pleas begun and continued in the district court of the second judicial district of the Territory of Colorado, in and for the county of Gilpin, in said State, before honorable Amherst W. Stone, judge of said court, to the November term, A. D. 1875, to wit, on the 10th day of June, A. D. 1875.

WATSON B. ROCKWELL, PLAINTIFF,
vs.
JOSEPH A. THATCHER, JOSEPH STANDLEY, defendants. } Assumpsit.

Be it remembered that heretofore, to wit, on the 10th day of June, A. D. 1875, said plaintiff, Watson B. Rockwell, sued out of the office of the clerk of said court a summons in said court against said defendants, Joseph A. Thatcher and Joseph Standley, in words and figures as follows, to wit:

TERRITORY OF COLORADO,
3 *Gilpin County, ss.*

The people of the Territory of Colorado to the sheriff of said county, greeting:

We command you that you summon Joseph A. Thatcher and Joseph Standley, late partners in business as Thatcher, Standley & Co., if they shall be found in your county, personally to be and appear before the district court of the second judicial district in and for Gilpin County, on the first day of the next term thereof, to be holden at the court-house in Central City, in said county, on the first Monday of November, 1875, to answer unto Watson B. Rockwell in a plea of assumpsit to the damage of said plaintiff, as he says, in the sum of six thousand dollars.

And have you then and there this writ, with an indorsement thereon in what manner you shall have executed the same.

[DISTRICT COURT SEAL.] Witness Chas. Withrow, clerk of the said district court of said county, and the seal
4 thereof, at Central City, this 10th day of June, A. D. 1875.

CHASE WITHROW, *Clerk.*

Which said writ was afterwards returned with the following endorsement thereon, to wit:

TERRITORY OF COLORADO,
Gilpin County, ss:

I have duly served the within writ by reading the same to the with-

in-named Joseph A. Thatcher and Joseph Standley, as I am therein commanded.

A. J. VAN DEREN, *Sheriff.*

Filed in the district court this 22nd day of June, 1875.
CHASE WITHROW, *Clerk,*
By SAM'L J. LORAH, *Deputy.*

And afterwards, and on the 18th day of October, A. D. 1875, said plaintiff filed his declaration herein in words and figures as follows, to wit:

TERRITORY OF COLORADO,
County of Gilpin, ss:

In the district court in and for Gilpin County, to the November term, 1875.

Watson B. Rockwell, plaintiff in this suit, by L. C. Rockwell, his attorney, complains of Joseph A. Thatcher and Joseph Standley, late partners in business as Thatcher, Stanle' & Co., defendants in this suit, summoned, &c., to answer the said plaintiff in a plea of assumpsit for that whereas heretofore, that is to say, in the year 1871, and for a long time prior thereto, Robert Cash, James Cash, and Watson B. Rockwell, plaintiff herein, were partners and doing business under the name and style of Cash, Rockwell & Co.; that their chief business was buying ores and reducing ores for themselves and others in their reduction works at and within Gilpin County aforesaid; that in running said reduction works the firm of Cash, Rockwell & Co. became and was in debt to divers persons to an amount of several thousand dollars, and that on or about the 12th day of June, 1871, the firm of Cash,
6 Rockwell & Co. applied to the banking firm of Thatcher, Standley & Co. for a loan of some money to pay the debts of Cash, Rockwell & Co. Whereupon said Thatcher, Standley & Co. loaned to said Cash, Rockwell & Co. the sum of ten thousand dollars, including an overdrawn account, taking as evidence of such loan the notes of Cash, Rockwell & Co. for that sum due in one year from the 18th day of June, 1871.

Which note was secured by a mortgage, or deed of trust, on the said reduction works of said Cash, Rockwell & Co. That soon after this loan said plaintiff had important business which called him East, and he left Colorado and did not return until the latter part of 1873. The firm of Cash, Rockwell & Co. continued their business at Gilpin County, aforesaid, and on or about the 19th day of June, 1871, said Robert Cash, together with said Thatcher, and unbeknown to the plaintiff, effected a sale of the business of Cash, Rockwell & Co. to N. P. Hill, or to the Boston & Colorado Smelting Company, for at least ten thousand
7 dollars, and received the money therefor.

That on the 19th day of June, 1871, said Robert Cash, acting for the firm of Cash, Rockwell & Co., paid to said Thatcher, Standley & Co. enough money to pay and liquidate all indebtedness then existing from Cash, Rockwell & Co. to said Thatcher, Standley & Co., including said notes and all interest thereon; that on this said 19th day of June, 1871, said Thatcher, Standley & Co. gave to said Cash, for said Cash, Rockwell & Co., a receipt reciting that in consideration of the receipt by them of ten thousand dollars, all accounts, notes, and demands

of Cash, Rockwell & Co. were paid to date. That from and after said 19th day of June, 1871, the firm of Cash, Rockwell & Co. did not owe nor was not in any way or manner indebted to the firm of Thatcher, Standley & Co. in any sum whatever.

That during the year 1872 said Thatcher, Standley & Co.,
8 through and by said Thatcher, began to demand of said plaintiff, who was still in the East, money to pay his share of the indebtedness due from Cash, Rockwell & Co. to Thatcher, Stanley & Co., which was a fourth part thereof. That on the 2nd day of July, 1872, said Thatcher, for said Thatcher, Standley & Co., wrote to plaintiff, at Cairo, Illinois, saying Cash would undertake to pay his *his* proportion of the interest due on the notes of said Cash, Rockwell & Co. to said Thatcher, Stanley & Co., and to pay all due on one note before Aug't 1, 1872, if said plaintiff could pay his proportion, and if that was done the balance could run awhile longer, & that said plaintiff's proportion of the interest on all the notes, & the principal on the first note, amounted to $1,433.88 at that date; that this much must be paid by said plaintiff; and the said plaintiff relying on the said statement of said Thatcher that said notes of Cash, Rockwell & Co. had not been paid, and being ignorant of
9 the sale of said reduction works, and supposing said indebtedness from Cash, Rockwell & Co. to said Thatcher, Stanley & Co. still existed, said plaintiff, then and there, sent to said Thatcher, Stanley & Co. the sum of three thousand dollars, with the request and direction that [$1,433.88] fourteen hundred thirty-three $\frac{88}{100}$ dollars be applied on the payment of his proportion of the indebtedness of Cash, Rockwell & Co. to Thatcher, Standley & Co., as stated and requested by said Thatcher, Stanley & Co., and the balance to be placed to the credit of said plaintiff in the bank of said Thatcher, Stanley & Co., and be subject to the checks of plaintiff.

That on or about the 2nd day of June, 1873, he was informed by said Thatcher, Stanley & Co. that his money had been received, and that $1,433.88 had been applied on the interest on all the notes, and the balance had been applied on the said notes of Cash, Rockwell & Co., and the plaintiff avers that on the 2nd day of July, 1872, nor at any
10 other time since the 19th day of June, 1871, the firm of Cash, Rockwell & Co. had not been indebted to the firm of Thatcher, Stanley & Co. in any sum whatever, and that said firm of Thatcher, Stanley & Co. knew that on the 2nd day of July its firm had no claim against the firm of Cash, Rockwell & Co.; that all the statements and representations made by said Thatcher for said firm to said plaintiff regarding the notes of Cash, Rockwell & Co. were false and untrue and were made to said plaintiff for the purpose of extorting and obtaining from him said sum of money without any consideration or an equivalent.

And the plaintiff avers that he paid said money on the sole and only representations and statements of said Thatcher made for his firm and on no other.

And the plaintiff avers that he has received no consideration or equivalent for said money whatever.

Wherefore, plaintiff avers that said Thatcher & Stanley are
11 justly indebted to him in the sum of three thousand dollars, with interest thereon from the 20th day of December, 1872, at the rate of ten per cent. per annum for the said money, so as aforesaid paid, and in consideration of said indebtedness the said defendants then & there undertook & promised the said plaintiff to pay him, the said

plaintiff, the said sum of money, when thereunto afterwards requested, to wit, at the place aforesaid.

And whereas, also, the said defendants afterwards, to wit, on the first day of June, 1875, at Gilpin County aforesaid, were indebted to the plaintiff in sum of five thousand dollars for money before that time lent and advanced to, & paid, laid out, & expended for said defendants, by said plaintiff, at said defendants' special instance and request, & for so much money before that time had & received by said defendants to & for the use of the said plaintiff, & in the sum of one thousand dollars for interest upon and for the forbearance of
12 divers sums of money then due and owing from said defendants to said plaintiff, & being so indebted said defendant, in consideration thereof, then and there undertook and promised to pay said plaintiff said several sums of money above mentioned when thereunto afterwards requested.

Yet the defendants not regarding their said promises and undertakings, but contriving, etc., although often requested so to do, have not paid said plaintiff either of said sums of money above mentioned *to the plaintiff*, or any part thereof, but so to do have wholly failed, neglected, & refused, and still do neglect and refuse so to do, to the damage of said plaintiff of six thousand dollars, & therefore he brings suit, etc.

By L. C. ROCKWELL,
His Attorney.

And afterwards, and on the 2nd day of November, A. D. 1875, the same being one of the regular judicial days of the November term of said court, A. D. 1875, there being present honorable Amherst
13 W. Stone, associate justice of the supreme court of the Territory of Colorado, and the judge assigned to said second judicial district thereof; , judge; William J. Buffington, sheriff; Chase Withrow, clerk, the following proceedings were had and entered of record in said cause, to wit:

WATSON B. ROCKWELL
vs.
JOSEPH A. THATCHER ET AL. } № 3270. Assumpsit.

At this day came the said plaintiff, by L. C. Rockwell, his attorney, & H. M. & W. Teller enter their appearance for defendants, & on motion of plaintiff, are by the court ruled to plead herein by the incoming of court on Monday, the 8th instant.

And afterwards, and on the 10th day of November, A. D. 1875, the defendants filed in said cause their plea to the common counts in said declaration in words and figures as follows, to wit:

TERRITORY OF COLORADO,
Gilpin County, ss:

In dist. court, Nov. term, 1875.

14 WATSON B. ROCKWELL
vs.
JOSEPH A. THATCHER & JOSEPH STANDLEY. }

And now comes the defendants, by H. M. & W. Teller, their attorneys, and as to the consolidated common counts in the plaintiff's

declaration mentioned, defend, &c., & say that they did not promise in manner and form as the plaintiff hath thereof in said count complained against them, & of this they put themselves upon the country, &c.

H. M. & W. TELLER,
Defendants' Attorneys.

And the plaintiff doth the like.

L. C. ROCKWELL,
Att'y for Pl'ff.

Filed Nov. 10th, 1875. Chase Withrow, clerk.

And afterwards, and on the 12th day of November, A. D. 1875, the same being still one of the regular judicial days of the November term, A. D. 1875, of said court, there being present the same judge and
15 officers as on the 2nd instant, the following proceedings were had and entered of record in said cause, to wit:

WATSON B. ROCKWELL
vs.
JOSEPH A. THATCHER ET AL. } # 3270. Assumpsit.

At this day come the parties, by their attorneys, and the demurrer of the defendants to the first count of plaintiff's declaration herein comes on to be heard and is argued by counsel, and the court being sufficiently advised in the premises, sustains said demurrer.

And afterwards, and on the 20th day of November, A. D. 1875, the said defendants filed in said cause the following further plea, to wit:

TERRITORY OF COLORADO,
Gilpin County:

In dist. court, at Nov. term, 1875.

WATSON B. ROCKWELL
vs.
JOSEPH A. THATCHER, JOSEPH STANDLEY, partners, &c.

16 And the said defendants, for a further plea in this behalf, say actio non, because they say that after the making of the several promises in the said declaration mentioned, and before the commencement of this suit, to wit, on the first day of June, 1875, they paid to the plaintiff, and the plaintiff accepted from them, the defendants, divers moneys amounting to a large sum of money, to wit, the amount of all the sums mentioned in full satisfaction and discharge of the said several promises & of the sums of money last aforesaid, & this they are ready to verify. Wherefore, &c., they pray judg't.

H. M. & W. TELLER,
Def'ts' Att'ys.

And for a further plea defendants say actio non, because they say that the plaintiff was before & at the time of commencement of this suit, and still is, indebted to him, the def'ts, in the sum of five thousand dollars for moneys before that time due & owing to said def'ts from said plaintiff for moneys before that time paid, laid out, &
17 expended at the request of the plaintiff, & for his use, & for a

like sum of money before that time loaned & advanced to said plaintiff by said defendants, & for a like sum for so much money due from said plaintiff to said def'ts for interest on money loaned by def'ts to pl'ff, & for a like sum for money found due upon a settlement of acc't then and there had between the said pl'ff & these defendants, which said sums of money so due from the plaintiff to def'ts as aforesaid exceed the damages sustained by the plaintiff by reason of the non-performance by the def't of the said several supposed promises in the said declaration mentioned, & out of which said sum of money the defendants are ready and willing, & hereby offer, to set off and allow to the plaintiff the full amount of the said damages, & this they are ready to verify. Wherefore, &c., they pray judg't.

H. M. & W. TELLER,
Def'ts' Att'ys.

And afterwards, and on the 20th day of November, A. D. 1875,
18 the same being still one of the regular judicial days of the November term, A. D. 1875, of said court, there being present the same judge and officers as on the 2nd instant, the following proceedings were had and entered of record in said cause, to wit:

WATSON B. ROCKWELL
vs. } № 3270. Assumpsit.
JOSEPH A. THATCHER ET AL.

At this day came the said parties, by their attorneys, and on motion of defendants this cause is continued at defendants' costs, said costs to include all the costs of this term.

And afterwards, & on the 1st day of May, A. D. 1876, the same being one of the regular judicial days of the May term, A. D. 1876, of said court, there being present honorable Amherst W. Stone, associate justice of the Supreme Court, and the judge assigned to said second judicial district, , judge; William J. Buffington, sheriff; Chase Withrow, clerk, the following proceedings were had and entered of record in said cause, to wit:

19 WATSON B. ROCKWELL
vs. } № 3270. Assumpsit.
JOSEPH A. THATCHER ET AL.

At this day came said defendants, by their attorneys, and on their motion leave is granted them to file additional pleas herein by the incoming of court, on Wednesday, the 3rd instant.

And afterwards, and on the 3rd day of May, A. D. 1876, said defendants filed in said cause *filed* the following further pleas *in said cause*, to wit:

TERRITORY OF COLORADO,
Gilpin County:

In district court, at the May term, 1876.

WATSON B. ROCKWELL
vs.
JOSEPH A. THATCHER, JOSEPH STANDLEY, partners, &c.

And the said defendants, by H. M. & W. Teller, their att'ys, for a further plea in this behalf, & by leave of the court had & obtained,

say actio non, because they say that in year A. D. 1867 one
20 Warren Hussey and Frank Palmer were partners, doing business in Central City, Colorado, under the firm name of Warren Hussey & Co., as bankers; that at and before that time the said plaintiff & J. P. Whiting & Wm. A. Whitney were partners, doing business with Warren Hussey & Co. under the firm name of J. P. Whitney & Co., the principal part of which business was conducted by the said Wm. A. Whiting: that the said Hussey & Co. kept the deposits of money of said Whitney & Co. and paid out the same upon the checks of said firm, usually drawn by said Whiting, & that the funds of J. P. Whiting & Co. were kept in name of Wm. A. Whiting, agent; that said Hussey & Co. paid out large sums of money upon such checks from time to time up till the 8th day of November, 1867, when the said J. P. Whitney & the said plaintiff & Whiting had some kind of an investigation of partnership affairs, at which time it was claimed by said plaintiff and Whitney that the said Whiting had used some three thousand dollars,
21 & that the same had been checked out of partnership funds in the bank of Hussey & Co.; that was unauthorized, & that such sum had been used by said Whiting for purposes of his own, or at least for purposes unauthorized by the said Rockwell and Whitney, & they thereupon insisted that said Whiting should make good the partnership acc't by payment of said sum, or that said Hussey & Co. should not deduct from the partnership funds such sum, but that Hussey & Co. should accept of the note of said Whiting for the amount claimed & not charge to said Whitney & Co. such amount, to which the said Hussey & Co. agreed, upon the assurance & promise of both the said Rockwell & Whitney that in consideration of the premises they would see that the note was paid. That thereupon the said Wm. A. Whiting made his note, bearing date Nov. 8th, 1867, by which, three months from date, he promised to pay to the said Warren Hussey & Co. the sum of three thousand dollars, with interest at the rate of three per cent. per month *three months from date thereof*, and the same was thereupon de-
22 livered to said Warren Hussey & Co.; and that the bank account of Whitney & Co. was corrected by deducting from the debts of said Whitney & Co. the said sum so said to have been Whiting's & not those of the firm.

These defendants further show that the said Warren Hussey & Co. never discharged said firm of Whitney & Co. from their liability to them, but took said note & made the correction as claimed by said plaintiff & Whitney, on the express agreement of Whitney & Rockwell that they would see that the note was fully paid.

These defendants further say that some time after the making of said note, to wit, in 1868, the said Whitney & Rockwell came to the banking-house of said Hussey & Co., & to the defendant Joseph A. Thatcher, who was then the duly-accredited agent & cashier of the said Hussey & Co., & having full power to act for said firm in that behalf, & thereupon the said Rockwell and Whitney assured said Thatcher,
23 acting as aforesaid, that the said Whiting had sold and conveyed to said Rockwell all the real estate & mining property theretofore owned by him, & had also transferred and delivered to said Rockwell a large amount of personal property, consisting of stock in the Bullion and Inca Mining Companies, and other property; that the same had been done on acc't of the failing health of the said Whiting, & in order to provide for the payment of all debts of said Whiting, & the said Rockwell assenting thereto, agreed that he had accepted such trust, & had taken into his possession such property of the said Whiting,

& thereupon, & in consideration of his receipt thereof, then and there agreed with said Thatcher, acting for said Hussey & Co., to pay the said note of the said Whiting above mentioned, to which said Hussey & Co. assented, & from that time thenceforward held the said Whiting entirely discharged from any and all obligations on said note, & relied wholly upon the promise of the said Rockwell to pay the same.

24 These defendants further say that a short time after such conversation the said Whiting became sick and too infirm in mind to attend to any business whatever, and so continued until his death in 1871, & that said Rockwell continued to use and sell the property so conveyed to him as his own, & no attempts were ever made to collect the said note of any person other than said Rockwell.

That in the year A. D. 1870, the said firm of Hussey & Co. was dissolved, & this defendant & Joseph Standley entered into partnership under the name of Thatcher, Standley & Co., & these defendants thereupon relying upon the promise of the said Rockwell to pay said note, bought the said note of the said Hussey & Co., paying therefor upwards of four thousand dollars, & the said note was duly assigned to these defendants; and they further say that at the time of the assignment of said note the said Whiting was very infirm, both in

25 body & mind, & utterly unable to attend to any business whatever, & that he died in 1871, and no administration was ever had upon his estate, & for the reason that all his property had before that time been conveyed to & taken by said Rockwell upon his promise to pay the debts of the said Whiting as aforesaid.

These defendants further show that at the times mentioned in the plaintiff's declaration these defendants held said note, & the same was unpaid, & that the moneys described in plaintiff's declaration as coming into their hands was taken and applied to the payment of the said note so assumed by said plaintiff, & his other indebtedness, & that the defendants on the trial hereof will set off and allow to the plaintiff the full amount due on said note made by said Whiting. And this the said defendants are ready to verify.

Wherefore they pray judg't, &c.

H. M. & W. TELLER,
Def'ts' Att'ys.

26 Filed May 3d, '76. Chase Withrow, clerk.

And afterwards, and on the 9th day of May, A. D. 1876, the same being one the regular judicial days of the May term, A. D. 1876, of said court, there being present the same judge and officers as on the first instant, the following proceedings were had & entered of record in said cause, to wit:

WATSON B. ROCKWELL
vs. } # 3270. Assumpsit.
JOSEPH A. THATCHER ET AL.

At this day come said plaintiff, by L. C. Rockwell, his attorney, and asks leave of court to reply double to additional pleas of defendants herein, filed May 3d, 1876, which leave is granted by the court.

And afterwards, and on the 9th day of May, A. D. 1876, said plaintiff filed in said cause his replication in words and figures as follows, to wit:

27 TERRITORY OF COLORADO,
County of Gilpin, ss:

In the district court in & for Gilpin County, to the May term, 1876.

WATSON B. ROCKWELL
vs.
JOSEPH A. THATCHER & JOSEPH STANLEY.

And the said plaintiff, as to the plea of payment by defendants above plead says that he, the plaintiff, by reason of anything in that plea alleged, ought not to be barred from having his aforesaid, because he says, that the defendants did not pay to the plaintiff the moneys in the said plea of payment in that behalf mentioned in full satisfaction and discharge of the several promises & sums of money in the said declaration mentioned as above in that plea alleged.

And this the plaintiff prays may be inquired of by the country.

And the defendants doth the like.

28 L. C. ROCKWELL,
Att'y for Pl'ff.

H. M. & W. TELLER,
Def'ts' Att'ys.

And the plaintiff by way of replication to the plea of set-off by said defendants secondly above pleaded, says that he ought not, by reason of anything in that plea alleged be barred from having his aforesaid action, because he says that he, the plaintiff, was not nor is indebted to the defendants in the manner & form as the defendants have above in that plea alleged. And this the plaintiff prays may be inquired of by the country, &c.

And the defendants doth the like.

By L. C. ROCKWELL,
Att'y for Pl'ff.

H. M. & W. TELLER,
Def'ts' Att'ys.

And the said plaintiff says, by way of replication to the additional plea of defendants, filed May 3rd, 1876, *says* that he, by reason of
29 anything in that plea alleged, ought not to be barred from having his aforesaid action, because he says he never was a partner together with William A. Whiting and James P. Whitney, and never was a partner in any firm doing business as J. P. Whitney & Co., & that he denies that he, James P. Whitney & William A. Whiting as partners ever had on the 8th day of November, 1867, or at any other time had an investigation or settlement of any partnership affairs, and denies that there ever were any partnership affairs to settle, & he denies that he and J. P. Whitney ever claimed that Whiting had used any money of the partnership funds of J. P. Whitney & Co., or that said Whiting had ever checked out any money from the banking-house of Warren Hussey & Co. belonging to the firm of Whitney & Co., or that said Whiting had used any such money for *the* purposes of his own. And the plaintiff denies that he and Whitney ever insisted that said Whiting should make good the partnership account, or that
30 said Hussey should not deduct from the partnership funds that sum of three thousand dollars. And the plaintiff denies that said Hussey should accept the note of said Whiting for the said sum of

three thousand dollars and not charge the same to said Whitney & Co. And the plaintiff denies that he and Whitney, or he alone ever agreed with Hussey & Co. to pay the said sum of three thousand dollars or to pay said Hussey & Co. the amount of the note of William A. Whiting to said Hussey & Co. or any other sum whatever.

And the plaintiff denies that there ever was a bank account of J. P. Whitney & Co. at the banking house of Warren Hussey & Co. in which he, said plaintiff was interested, and he denies that any such bank account ever received a credit of three thousand dollars or any other sum whatever by deducting from the debit side of said account any sum whatever.

And the plaintiff denies that said Warren Hussey & Co. ever
31 had any claim of any name or nature whatever against Whitney & Co. when the plaintiff was a member of said firm, and he denies that he ever was a member of any such firm, and he denies that Hussey & Co. ever had any claim against J. P. Whitney & Co., and he denies that said Hussey & Co. ever made any arrangements with William A. Whiting on account of any promise or agreement by the said plaintiff and Whiting or by the plaintiff alone, to pay any debt due from said Whiting to said bank, and the plaintiff denies that he alone or together with said Whitney ever promised or agreed to pay any money to said Hussey & Co. which said Whiting may have owed said banking-house of Hussey & Co.

And the plaintiff denies that he and Whiting ever went to the bank of Hussey & Co. or to Joseph A. Thatcher, or ever went to said bank alone or to said Thatcher, and assured the said bank or the said Thatcher that Whiting had sold and conveyed to said Rockwell
32 all the real estate and mining property theretofore owned by said Whiting or any real estate whatever, or that Whiting had transferred or delivered to said Rockwell a large amount of personal property, consisting of stock in the Bullion and Inca Mining Company, or other property, or any property or stock whatever, on account of the failing health of the said Whiting or any other account whatever, or to provide for the payment of the debts of said Whiting, or for any other purpose whatever.

And the plaintiff denies that he ever assumed or agreed that he had accepted such trust & had taken into his possession any property of said Whiting for any purpose whatever, and he denies that he then & there or at any other time agreed with said Thatcher, acting for said Hussey & Co. or otherwise, to pay said note of said Whiting or any part or portion thereof.

And the said plaintiff denies that by virtue of any promise or agreement made by him, the plaintiff, with said Thatcher or the bank
33 the said bank released said Whiting from said note.

The plaintiff further denies that from 1868 until the death of said W. A. Whiting he (Whiting) became sick and too infirm in mind to attend to any business, and he denies that any attempt was made to collect said Whiting's note from this plaintiff.

And the plaintiff further denies that defendant in 1870 formed a partnership under the name and style of Thatcher, Stanley & Co., & the plaintiff denies that the firm of Thatcher, Stanley & Co. ever purchased Whiting's note of Hussey & Co. or ever paid anything therefor, and he denies that said Thatcher, Stanley & Co. ever relied on any representations or promises made by the plaintiff that he would pay the Whiting note for he never made any.

And the plaintiff further denies that the said Hussey & Co. ever as-

signed said note to said Thatcher, Stanley & Co., and the plaint-
34 iff denies that said Whiting in the year 1870 was feeble and in-
firm in body and in mind & utterly unable to attend to business, and the plaintiff denies that no administration was ever had upon his estate, because the plaintiff had before that time taken said Whiting's property & promised to pay his debts.

And the plaintiff denies that at the time mentioned in said plaintiff's declaration that the defendants held said note of said Whiting, and he denies that the defendants had any claim or demand against him at the time defendant received the money in said declaration mentioned, and this plaintiff prays may be enquired of by the country, &c.

By L. C. ROCKWELL,
His Attorney.

And the defendants doth the like.

H. M. & W. TELLER,
Def'ts' Att'ys.

Filed May 9th, 1876. Chase Withrow, clerk.

And on said 9th day of May, A. D. 1876, said plaintiff filed in
35 said cause a further replication to said plea in words and figures as follows, to wit:

STATE OF COLORADO,
County of Gilpin, ss:

In the district court in & for Gilpin County, to the May term, 1876.

WATSON B. ROCKWELL
vs.
JOSEPH A. THATCHER, JOSEPH STANLEY.

Now comes the plaintiff, by L. C. Rockwell, his attorney, and by way of a further replication to the additional plea of defendants, filed May 3rd, 1876, by anything in that plea alleged, he ought not to be barred from having his aforesaid action, because he says that the several supposed causes of action against the plaintiff in said plea alleged did not, nor did any or either of them, accrue to the defendant at any time within six years next before the commencement of this suit, in
36 manner and form as the defendants have in & by their said plea alleged against the plaintiff. And this the plaintiff is ready to verify. Wherefore he prays judgment if the defendants ought to have their aforesaid claim against the plaintiff, &c.

By L. C. ROCKWELL,
His Attorney.

And the said plaintiff, by way of a further replication to the said additional plea of the defendants, filed herein on May 3rd, 1876, by reason of anything in that plea alleged, ought not to be barred from having his aforesaid action against them because he says he did not within six years next before the commencement of this , undertake and promise in manner and form as the said defendants in and by their said plea alleged against him, and this he is ready to verify; wherefore he prays judgment if defendants ought to have their said claim against said plaintiff, &c.

By L. C. ROCKWELL,
Att'y for Plaintiff.

Filed May 9th, 1876. Chase Withrow, clerk.

37 And afterwards, and on the 17th day of May, A. D. 1876, said defendants filed in said cause their rejoinder to plaintiff's replication to additional pleas, setting up statute of limitations in words and figures as follows, to wit:

TERRITORY OF COLORADO,
Gilpin County:

In dist. court, at May term, A. D. 1876.

WATSON B. ROCKWELL
vs.
JOSEPH A. THATCHER, JOSEPH STANDLEY.

And now comes the said def'ts, by H. M. & W. Teller, their att'ys, and as to the two replications of the said plaintiff to the additional pleas of the said defendants, which set up that the causes of action alleged in said def't's pleas did not accrue to them within six years, & to both of those replications defendants say they ought not to be barred of their aforesaid defense in the said pleas set forth because they say they did accrue to the defendants within six years before the
38 commencement of this suit. And this they pray may be enquired of by the country.

H. M. & W. TELLER,
Def'ts' Att'ys.

Filed May 17, 1876. Chase Withrow, cl'k.

And afterwards, to wit, on the 6th day of March, A. D. 1877, the same being one of the regular judicial days of the March term, A. D. 1877, of the district court in and for the county of Gilpin in the State of Colorado; there being present, honorable William E. Beck, judge; William J. Buffington, sheriff; Chase Withrow, clerk; the following proceedings were had and entered of record in said cause, to wit:

WATSON B. ROCKWELL
vs. # 3270. Assumpsit.
JOSEPH A. THATCHER ET AL.

At this day came said defendants, by H. M. & W. Teller, their attorneys, and gave notice of a motion for leave to file supplemental
39 pleas herein.

STATE OF COLORADO,
Gilpin County, ss:

In district court, at March term, 1877.

WATSON B. ROCKWELL
vs.
JOSEPH A. THATCHER, JOSEPH STANDLEY.

And now comes the said defendants and move the court for leave to file supplemental plea for the following reasons:

1st. Since the issue was joined in this cause, to wit, in May, 1876, the said plaintiff in this case has become a bankrupt, and an assignee

of his said estate has been appointed & qualified, & def'ts desire to plead the same.

H. M. &. W. TELLER,
Att'ys for Def'ts.

Filed March 6, 1877. Chase Withrow, clerk.

And afterwards, & on the 26th day of March, A. D. 1877, the same being one of the regular judicial days of the March term, A. D.
40 1877, of said district court, there being present the same judge and officers as on the 6th instant, the following proceedings were had & entered of record in said cause, to wit:

WATSON B. ROCKWELL
vs.
JOSEPH A. THATCHER ET AL. } 3270. Assumpsit.

At this day came said parties, by their attorneys, and the court being now sufficiently advised upon the motion of defendants to file supplemental plea herein, grants them leave to file said plea.

And afterwards, and on the 26th day of March, A. D. 1877, the said defendants filed in said cause a supplemental plea in words and figures as follows, to wit:

STATE OF COLORADO,
County of Gilpin:

In district court, at March term, A. D. 1877.

WATSON B. ROCKWELL
vs.
JOSEPH A. THATCHER, JOSEPH STANDLEY.

41 And the said defendants, by H. M. & W. Teller, their att'ys, come, and by leave of court first had & obtained, & for a supplemental plea herein, they say actio non, because they say that heretofore, to wit, on the 23rd day of May, A. D. 1876, the said plaintiff, Watson B. Rockwell, filed his petition in bankruptcy in the district court of the United States for the southern district of the State of Illinois, claiming the benefits of an act entitled an act to establish a uniform system of bankruptcy throughout the United States, approved March 2nd, 1867, and that upon such petition the said plaintiff was adjudged a bankrupt, by the register in bankruptcy of said court, on the 26th day of May, A. D. 1876, & on the 14th day of July, A. D. 1876, one George Fisher was duly chosen by the creditors of the said bankrupt assignee in bankruptcy of the estate of the said plaintiff, & thereupon the said Fisher then and there accepted said appointment of as-
signee as aforesaid, & the said appointment was then and there
42 approved by the said register in bankruptcy, & the said register, to wit, John Q. Harman, did, in accordance with the laws in such cases made and provided, make, execute, and deliver to the said George Fisher, assignee as aforesaid, an instrument in writing under his hand, and did then & there by the said instrument convey to the said George Fisher, assignee, all the estate, real & personal, together with all books, deeds, and papers relating thereto of him, the said plaintiff, Watson B.

D. 1877, of said district court, there being present the same judge & officers as on the 5th instant, the following further proceedings were had and entered of record in said cause in said court, to wit:

WATSON B. ROCKWELL
vs.
JOSEPH A. THATCHER ET AL. } #3270. Assumpsit.

At this day came said parties, by their attorneys, & this cause came on for trial. And thereupon came a jury of twelve good and lawful men, to wit, John S. D. Manville, George Ruby, D. F. Page, M.
49 B. Laird, William Mundy, John W. Tiffany, Noah S. Allebaugh, George A. Pugh, Edward W. Williams, Matt. Pflume, George Thomas, & John H. Price, who were duly chosen, selected, empanelled, & sworn to well & truly try the issues joined herein and a true verdict render according to the evidence; after hearing the evidence, the arguments of counsel, & the instructions of the court the said jury retire to their rooms to consider of their verdict, in charge of a sworn bailiff.

And afterwards and upon the same day said jury returned into court their verdict in words and figures as follows, to wit:

"We, the jury, find the issues for the plaintiff, & assess his damages at forty-one hundred dollars ($4100.00.)

"GEORGE A. PUGH,
"*Foreman.*"

And thereupon said defendants filed their motion to set aside said verdict & for a new trial of said cause.

And afterwards, and upon said 27th day of September, A. D.
50 1877, the same still being one of the regular judicial days of said September, A. D. 1877, term of said district court, there being present the same judge & officers as on the 5th instant, the following proceedings were had and entered of record in said cause in said court, to wit:

WATSON B. ROCKWELL
vs.
JOSEPH A. THATCHER ET AL. } #3270. Assumpsit.

At this day came again said parties, by their attorneys, & the motion of said defendants to set aside said verdict & for a new trial of this cause came on to be heard & and was argued by counsel, & the court, being sufficiently advised, overrules said motion.

It is thereupon considered by the court that said plaintiff, Watson B. Rockwell, do have and recover of & from said defendants, Joseph A. Thatcher & Joseph Standley, the said sum of forty-one hundred dollars so as aforesaid assessed for his damages, & also his costs by him expended herein taxed to dollars, & that execution issue therefor.

51 And thereupon said defendants & each of them, jointly and severally, pray an appeal to the supreme court of the State of Colorado, which is granted by the court to either one or both of said defendants, and thirty days' time is given them, or either of them, in which to prepare & file a bill of exceptions herein & an appeal bond in the sum of five thousand dollars, with sureties, to be approved by the clerk of the court.

And afterwards, and on the 25th day of October, A. D. 1877, said defendants filed in the office of the clerk of said court their appeal bond herein, in words and figures as follows, to wit:

Know all men by these presents that we, Joseph A. Thatcher & Joseph Standley & Dennis Sullivan & Otto Sauer, all of Gilpin County, State of Colorado, are held and firmly bound unto Watson B. Rockwell, of the same State, in the penal sum of five thousand dollars, lawful money of the United States, for the payment of which, well & truly to be made, we bind ourselves, our heirs, executors, & administrators, jointly, severally, & firmly, by these presents. Witness our hands & seals this 25th day of October, A. D. 1877.

52

The condition of the above obligation is such that whereas the said Watson B. Rockwell did, on the 27th day of September, A. D. 1877, in the district court of the first judicial district of Colorado, within & for Gilpin County, & of the September term thereof, A. D. 1877, recover a judgment against the above bounden Joseph A. Thatcher and Joseph Standley for the sum of forty-one hundred dollars, besides costs of suit, from which said judgment of the said district court the said Joseph A. Thatcher & Joseph Standley have prayed for & obtained an appeal to the supreme court of said State of Colorado:

Now, therefore, if the said Joseph A. Thatcher & Joseph Standley shall prosecute their said appeal with effect &, moreover, pay the amount of the judgment, costs, interest, & damages rendered & to be rendered against them in case the judgment shall be affirmed in said supreme court, then the above obligation to be void; otherwise to remain in full force and effect.

53

JOSEPH A. THATCHER. [SEAL.]
JOSEPH STANDLEY. [SEAL.]
OTTO SAUER. [SEAL.]
DENNIS SULLIVAN. [SEAL.]

STATE OF COLORADO,
County of Gilpin, ss:

Dennis Sullivan & Otto Sauer, the sureties on the foregoing bond, being each duly sworn according to law, on oath deposes & says, each for himself & not one for the other, that he is worth at least five thousand dollars in property in said State over and above all his just debts & liabilities & of property exempt by law from levy & sale under execution or attachment.

DENNIS SULLIVAN.
OTTO SAUER.

Sworn to and subscribed before me this 25th day of October, A. D. 1877.

[DISTRICT COURT SEAL.] CHASE WITHROW,
Clerk District Court, Gilpin County, Colorado.

Filed and approved by me this 25th day of October, 1877.
CHASE WITHROW, *Clerk.*

54 And afterwards, and on the twenty-sixth day of October, A. D. 1877, said defendants filed in the office of the clerk of said district court their bill of exceptions, in words and figures as follows, to wit:

STATE OF COLORADO,
Gilpin County, ss:

District court, September term, 1877.

WATSON B. ROCKWELL
vs.
JOSEPH A. THATCHER & JOSEPH STANDLEY. } Assumpsit.

Be it remembered that on the trial of this cause in this term the plaintiff gave in evidence on his behalf as follows, that is to say, the following stipulation was read in evidence to the jury:

STATE OF COLORADO,
County of Gilpin, ss:

In the district court in & for Gilpin County, to the Sept. term, 1877.

WATSON B. ROCKWELL
vs.
JOSEPH A. THATCHER & JOSEPH STANDLEY.

55 It is hereby stipulated and agreed by defendants that the following are the facts regarding certain business transactions had by and between the firm of Cash, Rockwell & Co. of the one part and the defendants of the other part. That the firm of Cash, Rockwell & Co. owned and operated certain reduction works in Gilpin County during the year 1870 and a portion of the year 1871; that the firm purchased and treated ores at their works; that the bank account of the said firm of Cash, Rockwell & Co. was kept with defendants, who were then engaged in the banking business under the name & style of Thatcher, Standley & Co. That on or about the 12th day of June, 1871, defendants held two notes of Cash, Rockwell & Co. each for five thousand dollars ($5,000), drawing interest at 18 per cent. per annum, which notes were placed in the bank of defendants to secure them for whatever advances they might make to said firm of Cash, Rockwell & Co. in their business; that said notes were secured by a deed of trust on the said reduction works of Cash, Rockwell & Co.; that on
56 or about the 19th day of June, 1871, Robert Cash, of said firm of Cash, Rockwell & Co., paid to said firm of Thatcher, Standley & Co. enough money to pay all of the principal & interest due on said notes, and also to pay all accounts which the firm of Thatcher, Standley & Co. had or held against the firm of Cash, Rockwell & Co., & then & there gave to said Cash as evidence of such payment a receipt, of which the following is a true copy:

T. S. & Co., 6-19, '71.

Received Central City, Colorado, June 19th, 1871, of Robert Cash, ten thousand dollars in full of all acc's, notes, & demands to date against the firm of Cash, Rockwell & Co.
$10,000.] THATCHER, STANDLEY & CO.

And this stipulation may be read in evidence on any and all trials & hearings of this case.

H. M. & W. TELLER,
Defts' Atty's.

WATSON B. ROCKWELL, being duly sworn for the plaintiff & examined in chief by Mr. ROCKWELL, testified as follows:

Q. You are the nominal plaintiff in this suit now, ain't you?

A. Yes, sir.

57 Q. Do you know Joseph A. Thatcher?

A. Yes, sir.

Q. How long have you known him?

A. Ten or eleven years.

Q. Do you know Joseph Standley?

A. I did.

Q. Did you know a bank doing business as Thatcher, Standley & Company?

A. I did.

Q. Did you make & deliver to Thatcher, Standley & Company, together with Robert Cash & James Cash, any notes?

A. I did.

Q. When?

A. I think the first note we gave was in March, 1871.

Q. For how much?

A. I cannot tell the exact amount; several thousand dollars.

Q. For what purpose?

A. To balance an overdrawn account made by Robert Cash, doing business on account of Cash, Rockwell & Company.

Q. What business were they engaged in?

A. They were carrying on the reduction of ores.

Q. Where?

A. In Chase Gulch, in this county.

Q. When did the reduction works start?

58 A. About the first of April, 1870.

Q. How long did they continue in operation?

A. Till 1871, about the 20th of June.

Q. Who was the managing man of that concern?

A. Robert Cash.

Q. What part did you take in superintending & buying & treating the ores?

A. I did not take any special part in it. I put money in there & had a quarter interest. Mr. Cash was managing the concern. I knew nothing about the business & I went away about two weeks after the work started. I left for the East & with the exception of two or three months I was absent until the next March, 1871. It was understood between myself and Cash that he was to run the works, take charge of the works, and we corresponded on the subject. I was here in the summer of 1871, about three months.

Q. Did you give the firm of Thatcher, Standley & Company any other note?

A. We gave them two notes for five thousand dollars each on June twelfth, 1871.

Q. Do you remember how they were signed?

A. By our individual names. I signed them individually and Robert Cash & James Cash.

Q. For what purpose did you put these notes in?

59 A. To pay the note already—one that we had previously given three months before for some seven thousand dollars. Mr. Cash said he would like to have a little margin to work upon and we effected a loan of ten thousand dollars and gave two notes. It was understood that

our previous indebtedness was to come out of this sum, or credited to our account, against which we had a right to check.

Q. The balance over & above what you then owed was a working capital?

A. Yes, sir.

Q. How long did you remain here after June 12th, when you gave these two notes?

A. On the nineteenth of that month I went to Boulder on some business, & was absent three days. On my return here, on the twenty-second, on going to the works on my return I found they were not in operation. I found that the furnace arch had fallen in. I found James Cash there & he informed me that Robert Cash——

(Objection.)

Q. Where was Robert Cash?

A. That is what I was going to state.

(The counsel for the defendant' here objected to anything James
60 Cash may have said, on the ground that it was improper and incompetent, but the objection was overruled by the court & the testimony admitted, to which ruling & decision of the court the defendants by their counsel then and there excepted.)

Q. What did James Cash say when you went there?

A. He said that Robert Cash had gone to California; that during my absence the furnace had fallen in, & he had received a despatch requiring his presence in California, & that he had taken this opportunity while the furnace was destroyed to go, but would return very soon and commence operations again.

Q. When did you leave here to go East after that?

A. This was in June, 1871. I went East about the first of the next February.

Q. In 1872?

A. 1872.

A. What was the cause of the stoppage of that work, if you know?

(To this question the counsel for the defendants here objected, on the ground that it was immaterial to any issue in this case, but the objection was overruled by the court, to which ruling & decision of the court the defendants by their counsel then & there excepted.)

61 A. Because of the furnace being damgaed.

Q. Why did your works stop at that particular time? Why did they suspend?

A. I don't know that; I can't state positively except that the furnace fell in.

Q. Have you had a conversation with Mr. Thatcher?

A. Yes, sir.

Q. State, if you know, why those works suspended at that particular time.

A. I met Mr. Thatcher on a certain occasion & he asked me if I would go to his house that evening.

Q. When was this?

A. Upon my return. I had not been long home from some trip. I made so many, I cannot very well recollect unless I am permitted to refer to data made at the time.

Q. You can.

A. I kept a diary. I left for the East February 8, 1873. This was about the first of October, 1874.

Q. When you returned?

A. Yes, sir. I returned in August. It was after my return from

Europe. I had been absent eighteen months. About the first of October I met Mr. Thatcher & he asked me to call at his house that
62 evening, as he wished to talk with me.

Q. In October or August?

A. October, 1874. I returned from Europe in August, 1873. I had been here & gone again. I started for London in January, 1874 I think. I kept a diary at the time and made a minute of the date at the time, but it is not very clear.

Q. State how much of the time you had been in Colorado after you come back from Europe in 1873 until you left again for the East up to October.

A. The first time I went East was shortly after the opening of Cash, Rockwell & Co's works, two or three weeks after the opening in 1870. I was absent a year, or until the next March, excepting that I came back here in the summer months.

Q. You say you went East in February?

A. Yes, sir, the February following, 1872.

Q. How long did you remain then?

A. Eighteen months.

Q. Returned when?

A. August, 1873.

Q. How long did you remain here in August, 1873?

A. I don't recollect about that, whether I went East again be-
63 fore January, 1875. I went in January, 1875, to London.

Q. When did you come back?

A. After going to London.

Q. Fix the time when you had the conversation with Mr. Thatcher.

A. That was in 1874, about the first of October.

Q. In what house did he live then?

A. On the Casey road, where he lives now.

Q. State the conversation you had with Mr. Thatcher?

A. Mr. Thatcher introduced the subject by reading a letter that he had received that day or quite recently from Robert Cash. He read this letter, which was a very insulting & threatening letter. After using some vile epithets, Cash gave him to understand that he would have a settlement; the substance of it was that it would be better for Mr. Thatcher to settle with him immediately. After reading the letter he went on to explain the cause of his having received such a letter. He stated that on a certain occasion Robert Cash came to him & proposed something in reference to the payment of these notes for ten thousand dollars. That he proposed they should endeavor to get money
64 from Professor Hill. Robert Cash was to abandon the works and agree not to operate in the reduction of ores in a county where it would come in competition with Professor Hill. This was the proposition from Cash. If they would obtain money from Professor Hill, the first money was to go to Thatcher, Standley & Company to pay these notes of ten thousand dollars they held against Cash, Rockwell & Company. If any more money than was necessary to pay these notes was received from Professor Hill it was to go to Robert Cash, & I was not to be paid any of the money so obtained if this transaction took place, but the notes were to be held in force over me and the whole amount collected if possible, collected from me & paid to Robert Cash; that Mr. Cash agreed to give Mr. Thatcher one thousand dollars if he would use his influence with Professor Hill to bring this about. Mr. Thatcher said that he agreed to this with Mr. Cash, and that he did all he could to bring it about. That he made appointments for Cash &

Professor Hill to meet at his house and talk over the matter &
65 that they did meet there on several occasions, remaining sometimes until nearly midnight; that the result of these meetings was that Professor Hill paid to Robert Cash in their bank the sum of ten thousand dollars at one time, which was applied, as agreed with Mr. Cash, toward the payment of these notes. He then stated that so far as collecting the whole amount from me afterwards, he never intended to carry that out; that he wished me particularly to understand that he was acting for me as a friend, as Robert Cash had no property here, & it was very uncertain whether he would pay his proportion of these notes; he felt that it was doing a friendly act to me to get the money out of Professor Hill to pay them, & they were thus paid. The notes were not cancelled & then as I knew that he collected from me $2,820.00 afterwards.

Q. After the notes were paid?

A. Yes, sir, after the notes were paid he went on to collect from me when I was absent, through letters, my share of these $10,000 notes. I didn't know they had been paid at all, but I knew I had paid
66 on them. He claimed at this time that I had made some promise to pay the debt of Mr. Whiting, and he stated that he had applied it in that way, & he thought that in consideration of what he had done in saving me from paying the whole $10,000 to him, I should allow the twenty-eight hundred and twenty dollars to be applied in that way whether I was under obligation to do so or not; if he had saved me from paying the ten thousand dollars that I ought to be willing to allow him to apply it in that way. He acknowledged that he had collected it in that way, & applied it on account of the note he held against Mr. Whiting, my father-in-law.

Q. Did he say anything about Robert Cash coming back & trying to start up again?

A. Yes, sir; he stated that after this arrangement with Mr. Hill, Robert Cash came back again and represented that he was going to start up the works again in Chase's Gulch, and commenced operations or advertised for contracts, &c., & that he and Hill had had another settlement. He didn't know how much Cash got of Hill, but thought several thousand dollars. At any rate he said he knew he had
67 made some arrangements with Professor Hill in regard to buying ore; they were to establish an ore yard, ostensibly to bid for it, but in purchasing ores it was understood between Professor Hill & Robert Cash——

(Objection. Objection sustained.)

Q. When was it you first learned that those two notes of Cash, Rockwell & Company had been paid for ten thousand dollars?

A. At that time Thatcher told me that was the first intimation I had of it or suspected anything of the kind.

Q. Did Thatcher say what he gave as evidence of the payment?

A. I think not; I don't recollect.

Q. State if this receipt I read to the jury was the receipt or evidence of the payment.

A. That is the receipt that Robert Cash showed to me. I will state that very soon after, two or three days after, the conversation that Robert Cash called at my office & said it was time to have a settlement. We never had had a settlement. He asked if it was not time to settle, & I said yes. He came to my office with a view to a
68 settlement, and he brought in against me one-fourth of this amount of ten thousand dollars, claiming that he paid to That-

cher all that indebtedness, & that I was owing him, Robert Cash, my portion of it, with interest, some three thousand dollars. He then shewed me the receipt from Thatcher, Stanley & Company, dated a few weeks previous to that, that he had paid it, & that was the receipt which was read by you.

(Paper shown to witness.)

Q. Whose writing is that, if you know?

A. I judge it to be Mr. Thatcher's writing.

Q. Don't you know whose writing that is on the top there?

A. I didn't see it written. I could not swear positively. I suppose it to be Mr. Thatcher's writing. He sent it & I received it from him. I suppose he wrote it.

The plaintiff here put in evidence a letter from Mr. Thatcher to Watson B. Rockwell, containing a statement of Cash, Rockwell & Company's account as follows:

STATEMENT.

Cash, Rockwell & Co. notes to July 2nd, 1872.

June 12, '71, 2 notes, $5,000 each			$10,000
All interest paid to Sept. 2, 1871, & paid on principal.			
69 By Cash of Rockwell & Co	$273 46		
" Robert Cash	3,000		
		$3,273 46	
			$6,726 54
Interest on $6,726.54 from Sept. 2, 1871, to July 2, '72, 10 mo's, @ 1½ %			1,008 97
			$7,735 51

Mr. W. B. ROCKWELL.

D'R SIR: Mr. Cash says he will undertake with your assistance to clear up all interest due on notes & pay all balance on one note on or before 1st day of August in following manner; the balance can run awhile longer if necessary:

This is his proposition, you pay ¼ of $2,735.51, say $683.88; you pay ¼ of the $3,000 paid by him last Sept., $750=$1,433.88.

He will pay the balance necessary to clear up the first note, $1,301.63; this he claims would be in the proportion of ¾ to your ¼, for instance, he has paid individually, say, Sept., 1871 ..... $3,000 00

Will pay now 1,301 63

You will pay, say 1,433 88

Making a total payment 5,735 51

¼ of which is $1,433.88.

I must insist that this much be done, & believe you will make
70 the effort to help this payment in some way to at least this extent.

Yours, truly,

J. A. THATCHER.

There has been no change in your private account since last statement.

Q. Where did you receive that letter?
A. I think in New York.
Q. When?
A. In July, 1872.
Q. At that time how long had the notes of Cash, Rockwell & Company been paid?
A. They were paid in June, 1871, a little over a year from the time he sent me this statement.
Q. At that time what claim or demand of any name or nature had Thatcher, Standley & Company against Cash, Rockwell & Company?
A. No claim whatever that I know of.
Q. At the time he made that statement to you was there any part or portion of that statement correct?
A. There was not.
Q. At that time did you know that these two notes had been paid?
A. I did not.
Q. In pursuance of that statement did you send any money to Thatcher, Standley & Company?
71 A. I did afterwards.
(Paper shown to witness.)
Q. Look at that letter & see whose writing that is.
A. My own.
Q. Look through the whole of it.
A. It is all my writing.
Q. Where written?
A. London, England.
(Paper shown to witness.)
Q. Look at that statement there. Who made that statement?
A. I did.
Q. From where did you get your data to make that statement?
A. From this statement in my hands?

Plaintiff puts in evidence a letter, dated London, England, from W. B. Rockwell to E. J. Giddings.

Q. State first to whom you wrote that letter.
A. To E. J. Giddings, my brother-in-law, acting as my agent for me in my absence.
Q. Read that to the jury distinctly.

Plaintiff here offered in evidence letter commencing:
"I have arranged for three thousand dollars at the bank of the Manhattan Company, New York."
72 The defendants counsel objected to the reading of this letter, but the objection was overruled by the court, & the defendants, by their counsel, then & there excepted to such ruling.
The letter was read in evidence as follows:

EXHIBIT A.

LONDON, ENGLAND, *Nov.* 27, 1872.

DEAR BRO. E. J: * * * I have arranged for $3,000 at the bank of the Manhattan Company, New York, or will have it there soon, & I enclose in this two checks against it, payable to Thatcher & Co., one for $1,570.93 & the other $1,429.07, & for the following pur-

poses: The first one to pay the interest on my share of the Cash & Rockwell notes to the 15th Dec., & my share of the balance on one note, to wit:

Amount due Sept. 2, '71		6,726 54
Int'st on same to Dec. 15, '72		1,557 19
		$8,283 73
Deduct one note		5,000
		$3,283 73
One-fourth of same	820 93	
¼ of 3,000, p'd by Cash	750 00	
Due from me Dec. 15, '72		$1,570 93

Mr. Thatcher will understand the above. Now, when Mr. Cash is ready to pay his proportion of the interest on the whole amount
73 up to Dec. 15th, and the balance of the one note, I want that check for $1,570.93 used to pay my proportion. If Mr. Cash should not be ready to pay his proportion at once, I want the amount placed to my credit on Thatcher, Standley & Co.'s books, with the understanding that the amount is placed there for the purpose of making such payment whenever Cash pays his proportion & will be used for no other purpose, & I hereby authorize and desire you to check it out for that purpose, or any proportion of it, whenever Cash pays his proportion. And being placed there virtually as a payment, Mr. Thatcher will of course agree not to charge me further interest on that amount. You & he will both understand why I do not want any endorsements on the note excepting payments made by both parties, probably for the same reason that Cash does not.

Now, with the other amount I wish to make a special arrangement with T. S. & Co., if acceptable to them. I wish to deposit the $1,429.07 check to my individual account with them, not as a payment on the other note, but with the understanding that as long as it remains
74 there, or $1,250 of it, my ¼ of the other note, that they will treat it as they voluntarily did the amount I left with them last year, that is, allow me the same interest on it they charge me on the note. I do not intend if I can avoid it to draw out any portion of $1,250 until it is done for the purpose of paying the other note, but just now I am not in a position financially to use it for that purpose, and in case of emergency I must reserve the privilege of checking out any portion or all of it. I have no doubt Mr. T. & Co. will accede to my wishes in this respect also. I wish further to propose to Mr. Thatcher that whenever Mr. Cash is ready to pay the other note, his ¾ of it, that he accept it & cancel the note, & for my share, $1,250, I will give them my note secured by deed of trust on my portion of the mill, which embraces that wing & all the machinery. This I believe Mr. T. will do under these circumstances; the engine & boiler alone are worth that. If he desires before making the statement to Mr. Cash that he will relinquish the note upon his paying ¾ of it, let him read the orig-
75 inal agreement between Cash & Brother & Mrs. R., so he will understand how her improvements there are connected with Cash & Co.

You will see that she or her representative has the right at any time to remove the machinery, &c., & if Mr. T. should accept this last proposi-

tion let him ask his attorney if that agreement between the Cashs & Mrs. R. is sufficient for her to be secure in her rights, standing as they do, upon land claimed or owned by Mr. Cash. It might be advisable to have the agreement recorded, or that portion of it covering the right of property.

I should esteem it a favor if Mr. T. would get Mr. Butler's advice on that, if he is their attorney, & if satisfied on the security of it I trust he will at once give Mr. Cash the opportunity of paying his proportion of the other note. In case this is done, Mrs. R. better execute the deed of trust & I will sign the note. And in order to have everything ready there I will send a note which can be used if required. You will please let Mr. Thatcher read what I have written in regard to
76 this matter. And as I have before written, I wish he would take charge of Mrs. R.'s interest in the mill, & I will say to you especially do not let that be run in any way subjecting me to any liability of loss during my absense. Get legal advice, & if necessary a notice must be put in the paper that I will not be responsible for any debts contracted by Cash & Co. Before doing this, however, speak to Mr. Cash about it. But if not considered necessary by Mr. Teller I rather you would do neither, that is, neither advertise it or speak to Cash about it, or say anything about it any way. Perhaps Cash starting up again with a new partner & under a new style of firm, Cash & Co., before it was Cash, Rockwell & Co., will be quite sufficient to clear me of all liability, as it can be shown that neither myself nor Mrs. R. has had anything to do with this last movement in any way.

Please notify Messrs. Thatcher, Standley & Co. personally that I will not be responsible for the debts of Cash & Co., but they will please say nothing about this to others. If Cash & Co. should
77 do business at the other bank, I wish you would also ascertain of them if they consider me one of the firm, & if so notify them the same.

Yours, truly,

W. B. ROCKWELL.

(Paper shown to witness.)

Q. Whose writing is that?

A. I suppose it is Thatcher's.

Q. Do you know it?

A. I am satisfied of it; I didn't see him write it; I received it from him & that is his signature.

Q. When did you receive it?

A. In April, 1872.

Q. Where were you all that time?

A. I was East somewhere, New York or Boston, I think.

Plaintiff puts in evidence a portion of a letter marked number three, as follows:

CENTRAL CITY, *April* 4, 1872.

WATSON B. ROCKWELL,
Cairo, Illinois:

DEAR SIR: Do you hear from Mr. Cash these times; do you
78 think he will pay part of the bal. on our debt. I wish you would stir him up, & in some way help us some on our claim. Truly I never saw money so close here since I have been in business.

(Signed) J. A. THATCHER.

Q. At the time he wrote this letter how long had the notes of Cash, Rockwell & Company been paid?

A. That was in April, 1872?

Q. Yes, sir.

A. They were paid in June, 1871, as I since learned, or as I afterwards learned.

Q. At that time state whether the bank had any claim on Cash, Rockwell & Company, as referred to in this letter.

A. Not to my knowledge.

Q. Of any character or description?

A. Not of any character or description.

The plaintiff offered in evidence the following stipulation:

STATE OF COLORADO,
County of Gilpin, ss:

In the district court in & for Gilpin County; to the September term 1877.

WATSON B. ROCKWELL
vs.
JOSEPH A. THATCHER & JOSEPH STANDLEY.

79 It is hereby stipulated that Elijah J. Giddings would, if on the witness stand in this case, testify as follows:

1st. That he, Giddings, received from Watson B. Rockwell, in due course of mail, a letter dated London, England, Nov. 27, 1872 (& now marked Exhibit A).

2nd. That such letter contained two checks drawn by said Rockwell in favor of Thatcher, Standley & Co., on a bank in New York, one check being for $1,528,93, the other for $1,421.07.

3rd. That upon the receipt of said letter he showed Thatcher the instructions contained therein, & delivered to T. S. & Co. these checks as Rockwell's agent.

4th. That afterwards, and before the 28th day of January, 1873, Giddings & Thatcher had several talks regarding the disposition of the money specified in said checks; that Thatcher wanted the amount of the two checks applied to the payment of what Thatcher represented to be two unpaid notes of Cash, Rockwell & Co., but that said Giddings, on behalf of Rockwell, objected to having this done, as it was contrary to the instructions of Rockwell. That Thatcher wrote Giddings two letters regarding this matter, one of which is in pencil &
80 without date (but is now marked Exhibit B); the other is dated January 28th, 1873 (& is marked Exhibit C).

That after receiving these letters & having these talks, & without receiving any further instructions from Rockwell, he did permit Thatcher to apply the money on what he supposed were these unpaid notes of Cash, Rockwell & Co., or at least $2,820.93 of such money; & this may be read in evidence.

H. M. & W. TELLER,
Def'ts' Att'ys.

Q. Did you give Mr. Giddings any further instructions besides those given in this letter which you have read?

A. I did not.

Q. Is this the same Giddings referred to in the stipulation, & referred to in the letter?

A. Yes, sir.

Q. State whether the checks mentioned in the stipulation & those in the letter are the same.

A. They are the same checks.

Q. Were they paid?

A. Yes, sir; they were paid, as showed by account with the bank.

The letter referred to in the stipulation, & marked Exhibit C,
81 from Thatcher to Giddings, was here read in evidence, as follows:

CENTRAL CITY, COLO., *Jan'y 28th*, 1873.

E. J. GIDDINGS, Esq.,
Denver, Colo.:

DEAR SIR: Yours 25th is at hand & contents noted. I have no intention of changing my understanding or having you change your instructions. Concerning Mr. Rockwell's deposit, my suggestion is for the benefit of Mr. R. in getting himself relieved from the whole "thing" entirely, & if you, as his agent, & Mrs. R. (who has had some talk with me before your letter came), should insist on the strict letter of Mr. R.'s instructions, then you may embarrass the settlement with C., & this I wanted to explain to you in person when I was down. You being absent & I in a hurry, did not attempt it in my note to you. You see Cash's part am'ts to over $5,000, & a week or ten days ago he asked me if he could raise $4,000 money if his note secured on works would be taken from bal.; this I declined; told him I already had that security, & must, if the matter was fixed up, have the money or a new se-
82 curity that was tangible & could be used &c., &c. He had no other in Colorado to offer, & so concluded to raise the money if R. was ready to pay his, &c., by Feb'y 1st. Now you see if I take Mr. R.'s note, secured on same property, or a part of the same, it would certainly cause a "rumpus" between Cash & I, & besides there might be other unsettled debts, a/c, &c., &c., either outstanding against C. & R. or between themselves, & therefore I would rather not have any further lien or claim on the works or any part of them. It might involve me in difficulties with either C. or R. or somebody else; &, again, if I took the security & trouble arose between C. & R. I would be forced into siding with R., when I could do more good if trouble arises between them by occupying a neutral ground. It certainly will make no difference if I agree to loan or advance Mr. R. the $1,250 or any part of it, any time he may want to use it, if this matter is paid now, by simply taking his paper for it with what security he himself considers good for such an am't; or, as the machinery is in Mrs. R.'s name, I will
83 agree to take her name, with Mr. R.'s, for the $1,250, any time he may want it, & for any reasonable time, or any part of the am't; if not needed so much the better. The security on the machinery I cannot consistently take & do not want, & this is my reason for suggesting that Mr. R. pay all his part now & have these old notes & mortgages destroyed.

Yours, very truly,

THATCHER.

Cash said to me if he did pay his full part of the paper he would expect the trust deed released & property freed, & releasing either him or Mr. R. from the notes would not release the property unless the notes were fully paid.

Q. State what three thousand dollars were referred to in that letter.
A. I can't see that it can be any other three thousand dollars than those I sent to Giddings; that was the only money I sent to him.

The plaintiff here introduced in evidence a letter in pencil writing, marked in the stipulation Exhibit B, from Thatcher to Giddings, which was read to the jury as follows:

84 DEAR GID: Cash has made an agreement to take up his part of those notes Feb'y 1st, or about then. I shall see that they are paid in full before anybody is released. It will take about the $3,000 to pay Rockwell's part, & if I can get Cash to pay his, I want your check on Rockwell's a/c for his part. Can I go ahead & close the matter up on this understanding? Please ans., as I think it very important that Mr. R. get off that paper as soon as possible.

Yours, hastily,

THATCHER.

Q. State what money was referred to in that letter, or what notes of Cash, Rockwell & Company.
A. The same two notes of five thousand dollars each.
Q. At this time, in January, 1873, what indebtedness was there?
A. It is the same indebtedness.
Q. In your "instructions relating to the matter," what are they?
A. The same instructions in my letter to Giddings that I read.
Q. State to the jury whether or not any part of that letter in regard to the indebtedness of Cash, Rockwell & Company is true.
A. Cash, Rockwell & Company were not owing anything to Thatcher, Standley & Company at that time.
85 Q. Did you know anything of the payment of the notes of Cash, Rockwell & Company?
A. I did not.
Q. How much in pursuance of the statements & letter did Mr. Thatcher get from you to apply on these Cash, Rockwell & Company notes?
A. $2,820.93.
Q. About what date?
A. In December, 1872.
Q. At the time you paid this money you did not know anything about these notes being paid; you stated that?
A. Yes, sir.
Q. What induced you to pay the money?
A. It was the letter I received from Giddings & Mrs. Rockwell in regard to what Thatcher stated to them. I wanted the notes fully paid & cancelled. I believed then that the notes were not paid, & that unless I paid my proportion at that time Cash would not pay his proporsion or any portion of them.
Q. State whether the statements you received from Mr. Thatcher had any influence on your mind.
A. It did. I believed these statements were true.
Q. Have you cast up the amount of interest on that amount of money from that time to now, at ten per cent.?
A. Not particularly. Not minutely.
Q. The Mrs. Rockwell referred to in these letters is your wife?
86 A. Yes, sir.
Q. Did you know where these notes of Cash, Rockwell & Company were after they were paid?

A. I did not.

Q. At the time you had the conversation with Thatcher where did he say they were?

A. I think he said he had them; that he held the papers still, & that I could see them at any time.

Q. Did you ever see them?

A. No, sir; I never called to see them.

Q. Who has been your attorney in Colorado since the year 1872, perhaps?

A. L. C. Rockwell, yourself.

Q. State if at any time you have assigned any part *of* portion of this claim in suit to me?

A. I did.

(Paper shown witness.)

Q. Whose signature is that?

A. My own.

Q. Read that over, please. What claim is referred to in there—what suit?

A. It refers to this claim against Thatcher.

Q. It refers to this identical suit & the subject-matter in litigation between you & himself at that time?

A. Yes, sir.

87 Plaintiff here offered in evidence the assignment of Watson B. Rockwell's claim in the suit to L. C. Rockwell.

The defendant's cousel objected to the admission of the certificate of assignment, on the grounds that it was not admissible under the pleadings, & the further special objection because it does not sustain the statement made in the replication; also that there is no proof of its execution prior to the proceeding in bankruptcy; further, that it is a conditional assignment & shows an interest remaining in the plaintiff in bankruptcy; &, further, that it is an assignment of only one-half of the interest, an undivided half. But the objection was overruled by the court; to which ruling of the court the defendants, by their counsel, then & there excepted.

Assignment was then read to the jury in evidence as follows:

CENTRAL CITY, COL., *Nov.*, 1875.

Whereas I am indebted to L. C. Rockwell in the sum of some *some* six hundred dollars for legal services; & whereas there are now several cases pending & undetermined, both in Gilpin & Clear Creek Counties, in which said L. C. Rockwell is my attorney, & being unable to pay said L.
88 C. Rockwell the amount of his bill, I hereby sell, transfer, & assign unto said Rockwell my interest in & to half the claim I now have in suit in the district court of Gilpin County against Joseph A. Thatcher & Joseph Standley, for the work said Rockwell has already done & what he may hereafter do in said cases, until said Rockwell shall be paid for his services in said cases.

W. R. ROCKWELL.

Q. State how you came to make that assignment to me.

A. It was made in accordance with the account.

Q. Since that was made have you paid me anything?

A. Not a dollar.

Q. As to Kate Rockwell's interest, she is your wife?

A. Yes, sir.

Q. State whether you were indebted to Kate Rockwell in any sum previous or more than four months previous to your bankruptcy.

(To this question the counsel for the defendants objected, on the ground that it was immaterial; &, further, that they could not show indebtedness existing between man & wife without showing that
89 it arose in some other way. But the objection was overruled by the court & the question allowed; to which ruling of the court the defendants, by their counsel, then & there excepted.)

A. I was indebted to her often more or less for a number of years. I transacted business for her. She bought property & had property obtained from her father when we first came to the country. I always transacted her business. I used money belonging to her for various purposes, & was indebted to her at the time I made this payment, and the amount I paid I considered half hers & charged it to her in the account, the account I was keeping with her.

Q. Repeat your answer.

A. I said I was indebted to her because I had money of hers when I paid this that I had not repaid.

Q. (By Mr. TELLER.) What else?

A. I considered half this claim hers.

Q. You did at the time?

A. Why, certainly.

Q. State what you said to her regarding the half of this claim, & more than four months previous to your going into bankruptcy, about giving her half of this claim in suit since you learned from Thatcher
90 that the money was paid on the notes, when in fact the notes were paid.

(To this question the counsel for the defendants here objected, on the ground that the assignment was a verbal one to his wife; that an assignment could not be made in that way to a wife or anybody else; that the assignment should be in writing, & that it was void by the statute of frauds. But the objection was overruled by the court, & the question allowed; to which ruling & decision of the court the defendants, by their counsel, then & there excepted.)

A. I gave her to understand from the commencement that one-half of it belonged to her; that she was to have one-half, if it was collected, on account of what I owed her. I told her that at several different times.

Q. At the time you made me over the half, why did not you assign it all to me.

A. Because half belonged to her; if the claim was mine, one-half belonged to her.

Q. How long previous to your bankruptcy was it when you talked with your wife?

A. It must have been a year or two.

Q. How many conversations did you have with your wife about it?

A. Several; whenever we spoke of it.

91 Q. Do you know whether your wife signed the trust-deed or mortgage to secure these notes?

A. I do not think she did; I signed it.

On cross-examination of this witness by Mr. TELLER, for the defendants, he testified as follows:

Q. On what property was the trust-deed you speak of?

A. On the addition to the Cash, Rockwell & Company Mill in Chase's Gulch.

Q. In whose name was the title?

A. In my wife's name.

Q. You think your wife did not sign the deed?

A. There was no deed for the property. Neither of us owned the ground. Whatever property we had it was owned or held under an agreement with Cash.

Q. You gave a trust-deed on the property?

A. Yes, sir.

Q. You said the title was in your wife?

A. Yes, sir.

Q. Your wife did not sign the trust-deed; you signed it?

A. Yes, sir; I signed it.

Q. Is that the way it was?

A. I think so.

Q. What was the object of your signing it?

92 A. I do not know. It seemed to be satisfactory to Mr. Thatcher. I was known as the "Co." with Cash. I had an interest in there.

Q. What?

A. A quarter interest. My wife & I held equal interests, which was one-quarter; that was understood between Mrs. Rockwell & myself.

Q. Any written agreement between you & Cash?

A. Yes, sir.

Q. Who was that written agreement signed by?

A. James Cash, Robert Cash, & Mrs. Rockwell.

Q. Your name was not mentioned?

A. No, sir.

Q. You had some understanding between you and your wife?

A. Yes, sir. I owned one-half.

Q. You owned one-half?

A. I owned one-half of the results of that work. She owned the property.

Q. And the property was the Cash, Rockwell & Company; was it Mrs. Rockwell's or Cashs'?

A. So far as the work was concerned, it was Mrs. Rockwell's & mine.

Q. The title was in them, not in you?

A. Yes, sir.

Q. You say this $2,820.00 you sent was paid to Thatcher; was this your individual money?

93 A. Yes, sir.

Q. Did Mrs. Rockwell have anything to do with this money?

A. I paid that money myself.

Q. Was there any part of it Mrs. Rockwell's money?

A. No part of it was hers.

Q. After this money was paid, when did you first begin to talk with Mrs. Rockwell about her having an interest in this money?

A. I do not recollect the time we talked the matter over about the loss occurring in running the works & about me paying this money, etc. After I learned that it was paid the second time & commenced suit to recover, then I told her it was understood between us that if anything was recovered one-half should be hers.

Q. After you commenced suit, was it?

A. I cannot say when it was.

Q. That is what you said a moment ago.

A. After I found out that it had been paid the second time—yes, it was after I commenced the suit, or about the time I commenced suit, we talked the matter over, that half we collected was to be hers.

Q. How much at that time was you indebted to her?

94 A. I cannot tell exactly; it was some two or three thousand dollars. I know I kept the account on the books.

Q. What for?

A. For various things; I cannot state all of them. Money I had received & exchanges we had made in mining property & other property.

Q. What mining property had you had of hers?

A. I do not know that I can name the lots; there were a good many of them. I could state by reference to papers. I cannot recollect now. I transacted business for her, & sometimes exchanged property with her, keeping an account.

Q. If you got any money for property that was hers can you state what it was?

A. There was a claim over here in Lake Gulch, in this district.

Q. The Williams?

A. No, I do not think that was it. I got five hundred dollars for it.

Q. When did you get the five hundred dollars?

A. In 1867, I think.

Q. What else?

A. I cannot recollect the particular things.

Q. How did she get this claim you sold for five hundred dollars, & where did she get it?

95 A. From her father, I think. I know she did. She got a number of claims from her father in different parts of the Territory here. Some of the property was in Montezuma, Summit County. I cannot recollect them now without reference to papers.

Q. You think it was as much as three thousand dollars?

A. I do; because when I made the assignment the account stood to her credit more than one thousand dollars. That I did not put in at all. I talked with her about it, & let it go, because she was my wife.

Q. You put in a note to Mrs. Rockwell?

A. Yes, sir; for $275.00, a note for money she let me have she obtained from her uncle.

Q. On this other sum you did not give a note?

A. No, sir; it was book-account.

Q. When she got the money from her uncle she let you have it & you made note?

A. Yes, sir.

Q. You told her if you got anything in this suit she should have half?

A. Yes, sir; I said she should have one-half.

96 Q. You did not make a contract in writing or assign anything to her in writing?

A. No, sir.

Q. You said Mr. Thatcher called on you, or you on him, & he gave you a statement of what Cash had done, & all about it; did he tell you how he had applied this money you had sent to him?

A. Yes, sir.

Q. State what he said about applying the money.

A. He said he applied it toward the payment of the note he held against William A. Whiting, my father-in-law.

Q. Did he tell you at that time why he applied it on that note?

A. He claimed I had agreed, or partially agreed, to pay it; that I ought to pay it.

Q. He told you he had applied it on that note for that reason?

A. Yes, sir.
Q. What answer did you make to him?
A. He handed out the note. I saw it was endorsed. I simply said, "I see."
Q. You saw the endorsement?
A. Yes, sir; & I said, "I see."
Q. What else was said on that occasion?
A. That was the last conversation that I recollect.
97 Q. Did he show to you that there was a balance due on the note & unpaid?
A. He did not say anything about that.
Q. What time was that?
A. About the first of October, 1874.
Q. Did you have any other conversation with Mr. Thatcher about that same matter?
A. I had one other conversation.
Q. When?
A. In the spring of 1875.
Q. You say it was the next spring?
A. I did not say the next spring.
Q. You say you signed this assignment. Do you remember the time when you filed your petition in bankruptcy & made the affidavit before Mr. Burrell down here?
A. Yes, sir.
(Paper shown to witness.)
Q. Look at that & see if that is a part of your schedule or assignment that you made at that time?
A. I presume it is. I do not see anything about it that is different.
Q. You put in this claim on the 26th of May. When you made this you returned this claim of L. C. Rockwell as so much due him?
A. If it is so stated there. I do not recollect now.
98 Q. You returned the same claim as so much secured by the assignment of this claim against Thatcher?
A. I did.
Q. Was the only security you gave him? (Paper shown to witness, being the assignment to Rockwell.)
A. Yes, sir.
Q. In this petition in bankruptcy you made out a list of your indebtness?
A. I did.
Q. And you swore at that time this was all the indebtedness existing against you that you knew of?
A. Yes, sir.
Q. Now you say there was another indebtedness due Mrs. Rockwell which you did not put in there?
A. Yes, sir.
Q. How did it come that you swore that this was all of your indebtedness when there was one thousand dollars due Mrs. Rockwell?
A. The reason I did not put in there was because the debt was due Mrs. Rockwell, and my attorney in Cairo said it might as well be left out.
99 Q. Why did you swear this was all the debts there were?
A. That was all the debts that would be claimed.
Q. How did you come to put in this $275.00?
A. Because that was a note.
Q. A note is not any more sacred than a debt of any other kind?

A. That is very true.

Q. If you owed Mrs. Rockwell one thousand dollars she had no note for, & you also owed her $275.00 more, what is the difference between the two debts?

A. I do not know that there is any.

Q. Why did you put in the $275.00 & swear that there was no other indebtedness, when in the same case there was $1,000 more?

A. Simply because I concluded not to put that in, knowing it would not be claimed against the estate; it was legally true that there was no other claim that would be sufficient; I thought that was all the indebtedness that would be claimed.

Q. When you made this assignment to Rockwell you did not understand that it was an out & out assignment of the whole amount of one-half of the claim, did you?

(Objection, & objection sustained.)

Q. When you made this assignment to L. C. Rockwell that has
100 been introduced in evidence here, did you intend it as an assignment of the whole claim, or only as assignment to secure Mr. Rockwell's debt, whatever that might be?

(To this question the counsel for the plaintiff here objected, on the ground that it was immaterial, and further that it was not proper cross-examination, and the court sustained the objection & refused to allow the question; to which ruling & decision of the court the defendants, by their counsel, then & there excepted.)

Q. For what purpose or with what end in view did you make the assignment to L. C. Rockwell?

(To this question the counsel for the plaintiff here objected, on the ground that it was immaterial & not proper cross-examination, & for the further reason that they could not go back of a written instrument.)

Q. In your schedule of debts in the bankruptcy matter did you report this debt to L. C. Rockwell as indebtedness against you secured by this claim?

A. Yes, sir.

Q. When was this schedule in bankruptcy made?

101 A. In May, 1876.

Q. It is dated May 26th here.

On the redirect examination of this witness by Mr. ROCKWELL, for the plaintiff, he testified as follows:

Q. Has Mr. Fisher, the assignee, been out here?

A. Yes, sir.

Q. State whether or not this claim is prosecuted with Mr. Fisher's knowledge that it is for the benefit of L. C. Rockwell, myself, & Mrs. Rockwell.

(Objection. Objection overruled, and defendants, by their counsel, then & there excepted.)

A. It is with his knowledge & his consent.

Q. Did he examine your assignment?

A. He examined all the papers. He came out here to examine the matter, & I corresponded with him. He knows of the assignment to my wife & considers it was proper.

Q. At the time you made me this assignment did you inform me or did I know of your intention to go into bankruptcy?

A. I had no intention of going into bankruptcy.

Q. At the time you made the assignment to your wife, did you intend to go into bankruptcy.

A. I had no expectation of any such thing.

102 Mrs. KATE ROCKWELL, being duly sworn for the plaintiff, & examined in chief by Mr. ROCKWELL, testified as follows:

(The defendants, by their counsel, here objected to this witness giving any testimony, on the ground that she was the wife of the plaintiff; but the objection was overruled by the court & the witness permitted to testify; to which ruling & decision of the court the defendants, by their counsel, then & there excepted.)

Q. Did you have any conversation with Mr. Thatcher, in the latter part of the year 1872 or the first of the year 1873, about the application of some money which your husband sent from Europe?

A. Yes, sir.

(The defendants, by their counsel, here objected to any and all testimony given by this witness, on the ground that she is the plaintiff's wife & that this is not a case that falls within the statute; but the objection was overruled by the court; to which ruling of the court the defendants, by their counsel, then & there excepted.)

103 Q. Did you have conversation with Mr. Thatcher about the application of some money, in the latter part of the year 1872 or the fore part of 1873, which your husband sent from England?

A. Yes, sir; I had several conversations with him.

Q. What did he say in those conversations?

A. He wished me to use my influence with Mr. Giddings to get him to pay the money, because he said the $10,000 was to be paid & Mr. Cash was to pay three-fourths & Mr. Rockwell one-fourth, & Mr. Thatcher told me that unless it was settled then my husband would probably have to pay the whole of it, and that was why I urged Mr. Giddings to pay the money to Mr. Thatcher—the one-fourth.

Q. What time was that?

A. It was in December, 1872, or January, 1873.

Q. Where was your husband at that time?

A. In London.

Q. How many conversations did you have with Mr. Thatcher about it?

A. I think he came twice to see me. I believe I sent for him once. I think he was not in the house more than three times.

Q. Was each conversation about the same subject-matter?

A. Yes, sir.

104 Q. State whether or not it was about the same thing.

A. Just about the same thing.

Q. State whether or not you did authorize and direct the payment of that money.

A. I did. I urged Mr. Giddings to pay it for the reason I have stated.

Q. State whether or not you believed the representations that Mr. Thatcher made to you, whether you believed they were true or not.

A. I did believe every word he said.

Q. Did you know at that time that these notes of Cash, Rockwell & Company were paid?

A. I did not know it then.

Q. Had you seen any of these notes?

A. No; I had not.

Q. Have you had a conversation with your husband about the undivided half of this claim in suit against Mr. Thatcher more than four months previous to his going into bankruptcy?

(To this question the defendants, by their counsel, here objected, on the ground that the assignment should be in writing; but the objection

was overruled by the court; to which ruling and decision of the court the defendants, by their counsel, then & there excepted.)

105 Q. State what conversation you or your husband had about transferring one-half of this claim to you & how many times you had a conversation between you with reference to it.

A. We had a good many conversations. We often spoke of it. I always knew one-half of the claim was my money.

Q. Why did he give you the one-half of it?

A. Because it was my money.

Q. How much money did he owe you?

A. More than that amounted to, more than that claim amounted to.

Q. Where did you get this money?

A. Part of it from the sale of property given to me by my father, & some I received from an uncle, & some I borrowed.

Q. You have not stated how many conversations you had with him about that; more than twice?

A. Yes, sir; lots of times, perhaps a dozen.

Q. How many times subsequent to the time you knew of the application of this money by Mr. Thatcher to the payment of this note, or, in other words, subsequent to the time your husband's coming back from Europe?

106 A. The first conversation was very soon after his return from Europe in August, 1873, & we have spoken of it many times since then.

On the cross-examination of this witness by Mr. TELLER, for the defendants, she testified as follows:

Q. How long after he got back was the first conversation?

A. He returned in August & we spoke of it then, perhaps within two or three days after his return.

Q. What was that conversation that occurred about this note?

A. We were speaking about this matter & I told him what I knew about it; he said well, one-half was mine.

Q. What did you know about it at that time you told him about it?

A. I knew that Mr. Thatcher came to talk with me about it, what he said, what he represented to me, that he urged me to use my influence with Mr. Giddings to have him pay it.

Q. Was that all you knew about it?

A. Yes, sir.

Q. Have you stated all the conversations that occurred between you & Mr. Thatcher when he came to see you?

107 A. I have not attempted to state his words, merely the objects of his call.

Q. Have you stated the substance of his conversation?

A. Yes, sir; I think I have.

Q. Anything said about his making a loan to Mr. Rockwell?

A. Yes, sir; there was; he said he would make a loan if we wished on a note for $1,250.00. I believe that was the sum named. I think that was the exact sum.

Q. Did he ask any security of you for that loan?

A. No, sir; he did not.

Q. You say you have had a good many conversations about the claim, the first within two days after your husband got home. When was the next one?

A. It would be impossible for me to name the time.

Q. What was said at that time?

A. I cannot remember anything except that I spoke of Mr. Thatcher coming to see me, why he urged the settlement of that note.
Q. What did Rockwell then say to you?
A. I don't remember anything that interested me particularly excepting that half of that money was mine. We spoke about our business relations.
108 Q. Half of what money?
A. That paid that claim.
Q. He said that half of the money he paid on the claim was yours?
A. Yes, sir.
Q. What claim were you talking about?
A. This claim of Mr. Thatcher's.
Q. The money that he paid to Mr. Thatcher?
A. The money that Mr. Giddings paid.
Q. What amount did Mr. Giddings pay?
A. $2,800.00 & something, I believe; he received the money in two notes.
Q. By Mr. Rockwell—notes or checks?
A. Checks.
Q. Where did this money come from to Mr. Giddings?
A. From my husband.
Q. You said this money you loaned your husband came from your uncle; how much?
A. $275.00.
Q. You had a note for it?
A. Yes, sir.
Q. That note was returned as indebtedness in the bankruptcy proceedings?
A. Yes, sir.
Q. You said you got some from your father; when?
A. I didn't say I got money from my father.
109 Q. What did you get from your father?
A. Property.
Q. What property?
A. Mining claims.
Q. Where were they situated, & how many?
A. I cannot tell you.
Q. When did you get it?
A. I cannot give the dates or times; all along from the time we first came to the country.
Q. Name any property you had from your father.
A. Yes, sir; I had the Lode.
Q. Where situated?
A. Over near Breckenbridge.
Q. What became of that?
A. I believe it was lost under the new law.
Q. Forfeited because you did not work on it?
A. Yes, sir.
Q. You didn't sell that?
A. No, sir.
Q. What other property?
A. I can't tell you without the list.
Q. Did you know of Mr. Rockwell's selling any property of yours & getting the money for it?
A. He sold lots in Georgetown.
Q. How much? How did you get these lots?

A. They were taken up in my name.

Q. Who took them up for you?

110 A. My husband.

Q. Taken up in your name?

A. Yes, sir.

Q. How many lots did he sell?

A. Six.

Q. What part of Georgetown were they situated?

A. In the lower part of the town.

Q. What were they sold for?

A. $2,000, I believe.

Q. When were they sold?

A. I don't think I can give the date.

Q. About how many years ago?

A. I don't know; they were sold to Mr. Morehouse.

Q. Did you make any improvements on these lots?

A. Yes, sir.

Q. Who did the work for you?

A. Mr. Rockwell attended to it—W. B. Rockwell.

Q. What improvements did you make?

A. Two or three small buildings.

Q. Who furnishedthe money?

A. Well, I don't know, I'm sure, whether I can tell about that; he attended to allmy business & kept the accounts straight on the books.

Q. Did you furnish the money?

A. He had money of mine all the time.

111 Q. Where did he get the money that he advanced of yours to improve these lots?

A. That was money I had from the sale of other property—other mining property.

Q. What other property?

A. I can't tell you, sir.

Q. How much money did you get for the sale of other property besides these lots?

A. I could not give the exact sum.

Q. Do you know you got any?

A. Yes, sir.

Q. About how much?

A. I could not name any sum.

Q. About when did you get it?

A. I got it at various times. We have lived here for ten years. I could not name any time.

Q. Who did you get it from?

A. My husband transacted my business & the money came from him direct.

Q. You got some property of your father. Do you know of his selling any property you got from your father?

A. Yes, sir; of a number of mining claims I got from my father.

Q. Who did you sell them to?

A. Different persons. I would *not* rather undertake to say definitely not because my husband attended to my affairs, & I didn't interest myself in the details.

112 Q. You didn't know how much you got, who you got it of, or when you got it?

A. Neither; I could not give the exact date of any one of these. It has been some time since I thought about the matter.

Q. You don't know whose money improved these lots in Georgetown, whether he used your money or his own?
A. I paid for them; I know that from the accounts.
Q. Did you keep an account with your husband?
A. Yes, sir.
Q. When did you pay for these improvements?
A. When they were made.
Q. What did they cost?
A. I don't remember what they cost.
Q. When did you sell these lots in Georgetown?
A. Three or four years ago; I sold the lots to Mr. Morehouse.
Q. Before or after you went into partnership with Mr. Cash over here?
A. After.
Q. Did you put any money in with Cash, Rockwell & Company?
A. Yes, sir.
Q. How much?
A. The cost of the machinery & the addition to the building,
113 & everything that was inside, was bought with my money.
Q. What did it amount to?
A. I could not give the exact amount.
Q. About how much?
A. I don't think I can tell you that without reference to the books.
Q. One or two thousand dollars?
A. I would say over two thousand dollars.
Q. In whose name was that?
A. Mine.
Q. Where did that money come from?
(To this question the counsel for the plaintiff here objected, on the ground that it was immaterial, & the court sustained the objection; to which ruling & decision of the court the defendants, by their counsel, then and there excepted.)
Q. Where did you get the money to put into Cash, Rockwell & Co.?
(To this question the counsel for the plaintiff here objected, on the ground that it was immaterial, and the objection was sustained by the court; to which ruling and decision of the court the defendants, by their counsel, then & there excepted.)
Q. State whether any part of this money that Mr. Rockwell
114 sent to Mr. Gidding, which you say Mr. Giddings paid over to Mr. Thatcher, whether any part of that money was furnished by you.
A. No, it was not. None of it was furnished by me.
Q. Who furnished it?
A. By my husband.
Q. Was it furnished to pay any debt you owed?
To this question the counsel for the plaintiff here objected, on the ground that it was immaterial, & the objection was sustained by the court; to which ruling and decision of the court the defendants, by their counsel then and there excepted.)

W. B. ROCKWELL, being recalled for the plaintiff and examined by Mr. ROCKWELL, testified as follows:

Q. Have you computed the interest on that amount of money until now?
A. Yes, sir.
Q. What was the basis of your calculation?

A. $2,820.93; that was the exact sum paid.
Q. At what time did you commence to calculate the interest on it?
A. On the first day of January, 1873.
Q. How much does it amount to?
A. If I have made no mistake the interest is $1,337.59.
Q. Interest added to principal, how much?
115 A. $4,158.52, if I have made no mistake.

L. C. ROCKWELL, being duly sworn for the plaintiff and examined by Judge BELFORD, testified as follows:

Q. You have an assignment of part of this claim made by W. B. Rockwell to yourself?
A. Yes, sir.
Q. Did you notify Mr. Thatcher of that assignment?
A. Yes, sir; I did the day after I got it. I showed it to him or read it to him.
Q. What was the date of the assignment?
A. November, 1875. I showed it to him because I was afraid Rockwell & he might settle, & that would cut me out, & I notified Thatcher that I owned half & Mrs. Rockwell the other half.

On the cross-examination of this witness by Mr. TELLER, for the defendant, he testified as follows:

Q. Did you show him that assignment?
A. Yes, sir.
Q. When was that?
A. It is dated November. I don't know what day in November it was.
Q. What November?
A. November, 1875.

Plaintiff rested.

116 The defendant's counsel here introduced a motion for a nonsuit, on the ground that under the pleadings in this case the plaintiff had not made out a cause of action but the motion was overruled by the court; to which ruling & decision of the court the defendants, by their counsel, then & there excepted.

The defendants gave in evidence on their part as follows:

JOSEPH A. THATCHER, being duly sworn for the defendants, examined in chief by Mr. TELLER, testified as follows:

Q. You are one of the defendants in this case?
A. Yes, sir.
Q. Do you know the plaintiff, Mr. Rockwell?
A. Yes, sir.
Q. Did you know William H. Whiting in his lifetime?
A. Yes, sir.
Q. Where did he reside?
A. Here.
Q. Did you know a firm doing business as Warren Hussey & Company?
A. Yes, sir.
117 Q. When did they do business here?
A. Beginning in 1863 to 1870.
Q. Were you employed in their bank?

A. Yes, sir.

Q. Did you know of Whiting's doing any business with Warren & Hussey's bank?

(The plaintiff's counsel here objected to any testimony being admitted under any of the pleadings pleaded in the case previous to the last one pleaded, that being the plea of puis darrein continuance; that they waived all other pleas & admitted that plaintiff had a good cause of action against defendants at time suit was commenced; & the only thing to be received in evidence now is under the plea of the bankruptcy of Rockwell. But the objection was overruled by the court; to which ruling & decision of the court the counsel for the plaintiff then & there excepted.)

Q. Did you know William A. Whiting?

A. Yes, sir.

Q. Did you know of his keeping a bank-account with Warren Hussey & Company; &, if so, how kept?

A. William A. Whiting, agent.

118 Q. Who was in the habit of checking against that bank-account?

A. Whiting himself.

Q. Do you know who he was acting as agent for; did he claim who was acting agent for?

A. J. P. Whitney & W. B. Rockwell were or appeared to be interested in that account.

Q. State if you know anything about J. P. Whitney & W. B. Rockwell coming to the bank to look over that account.

A. I did.

Q. What time was that?

A. In November, 1867.

Q. State what was the result in regard to overdraft.

A. Mr. Whitney came and overlooked the Whiting account; his account was good there. He had been doing an extensive business as agent. Rockwell was there all the time. Both came in and looked over the book, and looked over that account; the account had a credit at that time; it was not overdrawn during the time it was on the books. They come in one day in the month of November & said that Mr. Whiting had used about $3,000.00 of the money drawn from this ac-

119 count for his own use or had purchased things for his own use, or something to that effect. I told them that was no affair of ours, that I could not know anything about how he used the money. They wished me to take Whiting's individual note & credit the account of William A. Whiting, agent, or in other words, pay them.——

Q. (By Mr. ROCKWELL.) Do you mean W. B. Rockwell and Mr. Whitney?

A. Yes, sir; they wished me to take the Whiting note for $3,000.00, & requested me to take his individual note & credit the account of William A. Whiting, agent. I refused to do it at first & sent for Mr. Palmer, one of the partners of the firm of Warren Hussey & Company. I didn't have an interest in the concern of Warren Hussey & Company. Mr. Palmer came up & Mr. Rockwell & Mr. Palmer & myself, had a conversation about the matter. Whiting was not present, he had, I think, returned East. Mr. Rockwell urged Palmer to do this, stating that Mr. Whiting had been indiscreet in the use of money & had used Whitney's money or his own, whichever it was for his own pur-

120 poses, he said he had used Whitney's or Rockwell's money for his own use, the money that belonged to the account of W. A.

Whiting, agent. Palmer refused to do so as I had at first, because we were then perfectly safe in the matter, that account was not overdrawn. Mr. Rockwell told Palmer that Whiting had put into his hands as trustee or agent or turned over to him all of his property personal & real, enumerating what he had turned over. There was a lot of Consolidated Bullion stock, a number of shares of that, something like at par value, $100,000.00 worth of stock, anyhow a large lot of personal property & his house & lot & everything that he possessed.

Q. Mining prope.ty, too?

A. Yes, sir; then he said he proposed to go to New York & Boston at once; he said I would pay. I assume to pay Mr. Whiting's debts, & will pay Whiting the amount due him, and will pay the $3,000.00 here.

Q. (By Mr. ROCKWELL.) Rockwell assumed to pay Whiting's debts or Whitney's?

A. He was going to pay Whitney, Whiting was indebted to Whitney as well as to Warren Hussey & Company; he said he proposed
121 to pay this very soon, that he was going to Boston & had a partial offer for this stock of Mr. Whiting's, & he said then that he would pay this $3,000.00, & then he said he would give a written obligation on his part to pay this money, this $3,000.00, but as he did not know how soon he could dispose of this stock & personal property & he & Mr. Palmer could not agree when a written agreement should become due, when he would pay it, the time he would pay it, he saying that he believed he could pay it in a brief time, almost as soon as he reached Boston. I don't recollect that anything else occurred at that time. Palmer & myself then considered Rockwell's word as good as his note, he was doing a large business with us personally, as well as Mr. Whiting, who had been doing a large business with him & Mr. Whitney & Whiting, agent.

Q. What became of that note?

A. We took the Whiting note.

Q. Was it credited to him?

A. We credited it to the account of W. A. Whiting, agent, & paid it afterwards in the course of their business.

Q. What became of that note?

122 A. That note in 1870, I must say, I wrote to Mr. Rockwell before he returned from Boston, or while he was in Boston, asking him to pay this note of Mr. Whiting's. I think that he was absent then a long time; it might have been six months or a year.

Q. Did you get any answer?

A. I don't recollect, now, that I did; I am not certain but Mr. Palmer wrote to him; he knew of the transaction personally; he was here at the time of the promises made by Mr. Rockwell, and he might have written. The paper went on unpaid by Rockwell; the note run on. Mr. Rockwell was disposing, or I understood he was disposing of the Whiting property and paying his debts, but he didn't pay anything on the note. In the meantime he was doing business with us to a considerable extent, personally, having very often more than $3,000.00 to his personal credit with us; therefore, I did not annoy him about the matter. In 1870, on the first of January, it became the property of Thatcher, Standley & Company; they took it for the
123 full amount of the claim; took it, paying $3,000.00 for it. We considered that it was Mr. Rockwell's paper, & perfectly good. I do not think there was any more concerning that note, only he did not pay it.

Q. Was there any payment? have you ever made any endorsement on the note?

A. Yes, sir.

Q. When?

A. At the time I received it, I put the $2,820.93 on it—the same day it was paid & credited on bills receivable, February 11th, 1873.

Q. (By Mr. ROCKWELL.) To whose credit?

A. On the note, credited to bills receivable in the usual way, and endorsed it on the note, $2,820.93.

Q. From whom did you get the money?

A. From Mr. Giddings, the agent of Mr. Rockwell.

Q. After the money was credited when did you have the first conversation with Mr. Rockwell about it.

A. Sometime in September, 1874. I first told Mr. Rockwell I had applied it to the payment of that note; had applied the payment that Giddings made me on that note.

Q. What did he say?

124 A. I showed it to him at my house, & showed him the balance due on the note. He seemed pleased that the amount was paid; made no objection to it; never said a word in opposition to it.

Q. Did he ever claim that he was not liable to pay it?

A. No, sir; nor he never did during the three or four years the note had run. He never refused to pay it; I never could get any refusal from him.

Q. When did you first have any words with Mr. Rockwell about this payment?

A. I think it was in May, 1875. May or June; about June.

Q. The first conversation was in September, 1874?

A. Yes, sir; about the first of September.

(To this question and answer the counsel for the plaintiff here objected, on the ground that this testimony could not he admitted under the pleadings, & that no promise is averred in the pleadings, except that made in 1868, & which they have pleaded; that there is nothing in the replication that implies any other promise occurred, & no other debt, other than that of 1868; but the objections was overruled

125 by the court, to which ruling & decision of the court the plaintiff, by his counsel, then & there excepted.)

A. Some time in May or June, 1875, he sent me word; he wrote a letter, note, or something; it was a letter, put into the mail.

Q. Have you got that letter or a copy?

A. No, sir; it was destroyed, I suppose, because I supposed subsequent conversations with Mr. Rockwell made it unnecessary to keep it.

Q. (By Mr. ROCKWELL.) Do you know whether it was destroyed or not?

A. I believe it is destroyed.

Q. (By Mr. R.:) Do you know?

A. I think it was destroyed, because I considered the matter settled.

Q. (By Mr. R.:) When did you look for it?

A. Shortly after that time, because Rockwell, I think, sued the next November, 1875 or '76; it was about that time, something near that.

Q. (By Mr. R.:) Where did you look?

A. All through my office, everywhere.

Q. (By Mr. R.:) Have you ever seen it?

A. Never since.

Q. (By Mr. R.:) Have you looked at another time other than these?

A. No. I think I destroyed it. I think my testimony will show that I destroyed it.

126 Q. You can't say it was destroyed?

A. I think it was, finally; I know I could not find it. I wish I could find it.

Q. Tell what Mr. Rockwell said in that note.

A. Mr. Rockwell said however grateful he was at the settlement of the Whiting matter, that however willing he was to have this matter settled, as I had settled it by applying that $2,820.00 to the note, his circumstances then, would not permit him to allow me to do so without making a demand for recovery, or something of that sort; that he was poor, had lost everything since this settlement occurred; that he was discouraged, disheartened, & wanted me to pay back the money that I had credited on the note that I had received from Mr. Giddings. My recollection of that letter was——

(Objection.)

Q. State what you did.

A. I notified Mr. Rockwell that I had a $736.00 note due.

Q. Any suit commenced?

A. No, sir. The day after I received this I notified Mr. Rockwell that his & his wife's note for $736.00, was lying unpaid in the

127 First National Bank, and I wanted him to pay at once. That was my reply to his notice—overdue and unpaid.

Q. Did he come to see you?

A. He came the next day after that. We went into my private office. He apologized in every way a man could for making this demand upon me; asked my pardon, &c., & after we talked the matter over quite fully again, the whole circumstance of the payment of this paper. We spent over half an hour then, & he seemed quite satisfied with the settlement I had made; asked me to excuse his writing such a letter; & then asked me what I was going to do about this paper, then due, of his & his wife's, in the bank; if I was going to force collection, as I implied in my notice to him. I said to him, Mr. Rockwell, if you propose to act decently in this matter, those are the very words I used, & fairly, & do what is right in this matter, I will let your paper run until it suits your convenience to meet it. This $736.00 note was due the First National Bank then.

Q. What was this matter you speak of?

128 A. The whole settlement I made of the application of money on the Whiting note, that was the matter. We had talked it all over. Mr. Rockwell accepted of my extension & said it was all right.

(The plaintiff's counsel here objected to this testimony on the ground that it could not be admitted under the pleadings, that there was no issue in this case that would let this testimony in. Neither did the pleadings aver that they ever forebore anything, & that the First National Bank is not a party to this suit, & that there is no pleading of accord, satisfaction on file; that it is an attempt to plead a less amount in satisfaction of a greater; that there is no plea averring that the defendants in suit ever forebore, or agreed to forebear, anything in the suit which they had against Rockwell, but the objection was overruled by the court, to which ruling of the court, the *the* counsel for the plaintiff then & there excepted.)

Q. Go on.

A. Mr. Rockwell was satisfied about this matter, & I gave him

129 extension on that paper, & it was not paid for some two or three

months afterwards. He paid it before the commencement of this suit against me. That was the reason I destroyed this letter that Rockwell mentions, & I supposed the matter settled, & that that was the last I would hear of it.

Q. (By Judge BELFORD.) Did you extend the time of payment.

A. Yes, sir; I extended it, & it was paid July 28th, this was in May. I do not know when the paper was extended to, probably there was no definite time about it. I know it was paid at that time.

Q. You heard Mr. Rockwell's testimony here, as to these letters that were read this forenoon.

A. Yes, sir.

Q. Take these letters & explain the circumstances under which they were written, make any explanations in respect to them that you choose.

A. The firm of Cash, Rockwell, & Company were indebted to us $10,000.00 in two notes of $5,000.00 each, & these notes were paid by Mr. Robert Cash individually, & an individual receipt given to Mr. Robert Cash, June 12, 1871. Previous to the payment of that
130 debt by Mr. Robert Cash, I had a very full conversation with him about the business between Mr. Rockwell & himself. He said Rockwell was indebted to him, or had been the means of his losing a great deal of money in Colorado, through various causes, but that he would pay this $10,000.00 to me; he was aware at the same time that Rockwell was to pay this Whiting note to me, & hadn't done so; he was aware of that fact; he paid me the $10,000.00 with this understanding on his part, but I never promised to do it, he understood me in this way, he said I will pay these $10,000.00 if you will let these notes go on uncancelled, & allow them to remain in force against Rockwell until you collect the entire amount of that paper, & refund back to me this money, as I have been a loser by Rockwell to a far greater amount than that. That was his statement to me. He said also, that if I could get Rockwell to pay only one-fourth of this amount notwithstanding it had been *been* paid, that I might apply it to the payment of the debt due from Rockwell to me, this $3,000.00. I did not like to do that,
131 but I did do so because the amount owed us was large by Cash, Rockwell & Co.

Q. (By Mr. ROCKWELL.) You were to apply the quarter you got to pay the Whiting note?

A. Yes, sir; Cash wished me to do so, & he supposed the notes were to pursue Rockwell for the full amount, & he would not allow me to make any endorsement upon them?

Q. Is that the reason you gave an individual receipt.

A. Yes, sir. Cash left almost immediately. I don't know where he went; I believe South. I then set to work, not to make Rockwell pay the whole amount of this paper, but one-fourth of the paper, & it is our custom, & the custom of every other bank, to hold a paper after it is paid by one party, to collect off other parties, who are equally liable, & that is the cause of the writing of every one of these letters that have been written.

Q. (By Mr. ROCKWELL.) Is it customary for banks to collect twice over?

A. I didn't say so. That is not my testimony.

Q. (By Mr. ROCKWELL.) Repeat it.

132 A. I said it was customary after a paper had been paid by one of the parties to hold the paper at the request of that party, for the bank to hold it & try to collect it off the other party, without making it known that it has been paid, so as to make them contribute

toward it, that amount after being paid being returned to the man who paid the whole amount.

Q. Go on.

A. That's all I have to say about these letters. All of my efforts were to that object, to get that one-fourth of the notes, & I got it, & applied it on that note. I do not deny anything in the letters or anything I did.

On the cross-examination of this witness by Mr. ROCKWELL for the plaintiff, he testified as follows:

Q. You knew everything you stated in these letters was not true, didn't you?

A. No; I didn't know anything of the sort.

Q. Hadn't these notes been paid when that statement was made?

A. Yes, sir; that's true.

133 Q. The notes had both been paid when these letters were written?

A. Yes, sir.

Q. Was there anything true about these letters?

A. Yes, sir; the amounts were not endorsed on the notes. We were still figuring on them.

Q. Was not the money paid?

A. Yes, sir. That is shown on our books. It was paid.

Q. Did not you write these letters for the purpose of deceiving Mr. Rockwell?

A. I wrote them for the purpose of collecting from Mr. Rockwell on that paper; for the purpose of making him pay the balance on the Whiting note.

Q. Why didn't you write to him to pay the Whiting note; why didn't you ask him to pay that, instead of using this deceptive way?

A. Because I didn't believe then that he would do so. He had postponed it so long that I had no confidence in his making good his word on any subject.

Q. When you got the money from Mr. Giddings why didn't you say to Mr. Giddings "I've got the money from Mr. Rockwell, & I'm going to apply it on the Whiting note"?

134 A. I didn't have to go to Mrs. Rockwell or Mr. Giddings about that.

Q. Why didn't you say to them "I've got this money, & I'm going to apply it on the Whiting note?" Why didn't you say that to Mrs. Rockwell and Mr. Giddings?

A. I suppose I would have done so, but Cash didn't wish me to do so. Cash wished me to keep this matter to myself, & not inform Mr. Rockwell that he had paid them.

Q. Did you intend any part of the time to give Cash anything you might get from Mr. Rockwell?

A. No, sir; but Cash supposed I would have it pursue Mr. Rockwell for the whole amount of this paper.

Q. What was your object, if you did not intend to give Cash any of the money?

A. Cash thought he would get something out of it, but I supposed he would not.

Q. You knew he would not?

A. I knew he would not. I proposed to do with the money as I did do with it. I don't deny anything I did.

Q. Why didn't you tell Mr. Rockwell about it when you wrote to him?

A. That was Cash's business. I didn't want to get it mixed
135 up. It didn't interfere with Rockwell any.

Q. You say Cash paid these notes individually. You knew the good will of the Cash, Rockwell & Company concern paid these notes?

A. I did not.

Q. You knew it was the good will of the works over there paid these notes.

A. I did not know anything of the sort. The business was done under the firm name of Cash Brothers.

Q. Do you say this is an individual receipt, "Stanley, Thatcher & Company. $\frac{6}{19}$. Received Central City June 17th, '71, of Robert Cash, 10,000 dollars in full of all demands, &c., on account of Rockwell, Cash & Company"?

A. Yes, sir; that's all right.

Q. Didn't that pay their indebtedness?

A. Yes, sir; but that is an individual receipt.

Q. You knew where that money came from, didn't you?

A. No, sir; I didn't know where that money come from.

Q. You knew Professor Hill bought the good will of that concern?

(To this question the counsel for the defendants here objected, on the ground that it was immaterial where the money came from; but
136 the objection was overruled; to which ruling and decision of the court & the defendants, by their counsel, then & there excepted.)

A. Cash paid that money to me in currency; I don't know where he got it from.

Q. Didn't you help negotiate that sale to Professor Hill, whereby the good will of that concern was sold for $10,000 *dollars*, didn't you know from the commencement & during the entire negotiations, if the money was received, it was to apply on the Cash, Rockwell & Company's notes.

(To this question the counsel for the defendants objected on the ground, that it was immaterial, but the objection was overruled, to which ruling and decision of the court the defendants by their counsel then and there excepted.)

A. The negotiations & whatever passed between them was a good deal of it done in my office, in broad daylight, & a good deal of it I was familiar with, but had nothing to do with the terms of it.

Q. Didn't you know that the money that paid Cash, Rockwell & Company's notes, came from Professor Hill to Mr. Cash, & from Mr. Cash to you?

137 A. No, sir.

Q. Didn't you tell Mr. Rockwell that was the way these notes were paid?

A. I presume that's the case; I might have told him that; I presumed that it was so.

Q. Didn't you know at the time the notes were paid that Rockwell did not owe you anything?

A. Of course.

Q. When you wrote these letters it was the same?

A. Yes, sir.

Q. What became of these notes?

A. I don't know where they are, they belong to Cash & Rockwell.

Q. Did you give them to them?

A. No, sir. I don't remember; I held them until Rockwell paid his part; I had them at that time, then I tore the names off the notes. I told Mr. Rockwell so, it was good paper I thought.

Q. You say that some of this money went to Cash, Rockwell & Company's account. State how much they were owing you at the time this receipt was given on the 19th of June.

138 A. I didn't say part of this money went to anybody's account.

Q. You said he paid the notes?

A. Yes, sir; they were paid.

Q. And the amount of the notes was passed to their account against which they had a right to check?

A. Yes, sir.

Q. Did Cash, Rockwell & Company owe you?

A. The whole entire amount of 10,000 dollars, at the time it was paid.

Q. Was any part of it working capital?

A. I never heard of any working capital, except overplus in the bank on running account, this 10,000 dollars, was used for a working capital.

Q. Go back. Did Rockwell tell you he was a partner of J. P. Whitney & Co.?

A. No, sir.

Q. Was there any such firm as Whitney, Rockwell & Whiting?

A. I supposed they were partners; I believed so.

Q. Did you know that Whiting and Rockwell were partners?

A. No, sir.

Q. What makes you say Rockwell and Whitney were partners?

139 A. They were engaged in business here. Rockwell came to the bank and got a statement of how many checks were out of Mr. Whiting's and kept an eye on his account continually while Whiting was here.

Q. Don't you know that neither Rockwell, J. P. Whitney, William A. Whiting nor neither of the three were partners?

A. I did not. I supposed they were partners in some way with Rockwell.

Q. Did Whitney tell you they were partners?

A. No, sir.

Q. By what other right did you say they were partners?

A. Because he came in and inquired about his account.

Q. That led you to believe they were partners?

A. And they were constantly exchanging checks, &c., they were constantly doing such business as that done by partners, Whiting would give a draft & Rockwell would make a draft, & it went into the account of William A. Whiting, agent.

Q. In partnerships don't you put in the names of the members of the firm on your books?

A. No, sir; I don't know anybody who does that unless it is Millers.

140 Q. You say you had no interest in this business of Warren Hussey & Company, at the time you claim Mr. Rockwell promised to pay Warren Hussey & Company, this note?

A. Yes, sir.

Q. Did Rockwell or J. P. Whitney, or either of them, together or seperately, ever promise to pay you or Thatcher, Standley & Company this note?

A. I don't recollect that he did beyond the conversation that Rockwell & I had. I don't remember of any now.

Q, This promise you say he made, was made to Palmer a member of Warren Hussey & Company?

A. Yes, sir.

Q. Didn't you know that Rockwell then & there refused, & told Palmer he would not pay that note?

A. He did not.

Q. That you are positive of?

A. Yes, sir; I think Palmer asked him to write an acceptance, but he didn't want to pay it then.

Q. Didn't he tell Frank Palmer that he never would pay it?

A. No, sir; he said he would pay it within a very short time,
141 that's what he told him, that he had the means to pay it of Whiting's in his hands.

Q. Didn't Mr. Rockwell absolutely refuse to give Palmer any encouragement at all, & laugh at him?

A. No, he said he was willing to give an instrument to hold his property binding him in case of accident.

Q. If you let Whiting have the money, & you didn't think he was good in the premises, & Whitney & Rockwell would pay it, why didn't you get their names on the note?

A. Whiting was considered perfectly good; he had more than 100,000 dollars, at that time, at the time the note was executed.

Q. You don't say that Whiting was ever supposed to be worth 100,000 dollars, do you?

A. I believe Rockwell stated his stock in the Bullion Consolidated, was worth more than that, a great deal of property had a high fictitious value then.

Q. Why did you want Whitney & Rockwell to pay that note?

A, Because they promised to pay it.

Q. Is that the way you do business, take a man's promise to pay a paper without getting his name upon it?

142 A. No, not any more, that learned us something, we didn't know as much then as we think we do now.

Q. Where did Whiting get this money that he kept in his name as W. A. Whiting, agent?

A. By drafts from Mr. Whitney, or on Mr. Whitney. He would make a draft on Whitney when he wanted money, & they were nearly all paid through our bank.

Q. Give us an estimate of the amount of money Whiting drew on Whitney for.

A. In the neighborhood of 20,000 dollars; 17 to 20,000 dollars.

Q. Was it not over 50,000 dollars?

A. I don't know.

Q. Was it not over 125,000 dollars?

A. I don't think it was as much as that. I don't know how much it was.

Q. Why didn't you, at the time you say Rockwell offered to give a written obligation—why didn't you take it?

A. Palmer & he could not agree upon the time; you understand there was a difference about the time he should meet it, Mr. Rockwell wishing to obtain from the assets or personal property put in his hands by Whiting; he wished to obtain money from the property to pay this money, & we supposed he would pay it as he agreed to.

143 Q. Do you say that Rockwell at any time, spot, or place, or under any circumstances, ever said to you or to Frank Palmer that he held the Whiting property in trust to pay his debts?

A. Yes, sir; he told me Whiting had put it into his hands for the purpose of paying his debts; every single dollar he had; & Whiting told me the same thing; all the property he had—all the property Mr. Whiting had.

Q. Turn to your account here in the books & see when it was you credited the account of William A. Whiting, agent, with the amount of the Whiting note.

A. November 5th, 1868, or 1867. There it is—3,000 dollars.

Q. Do you know what Rockwell did with the 3,000 dollars?

A. We checked it out to William A. Whiting on William A. Whiting's check.

Q. Ain't it a fact that you took a draft from William A. Whiting on his brother at Taylor's Falls, Minnesota, which draft was not honored by his brother; & when the draft got back you had advanced the money on the draft & took Mr. Whiting's note for the amount on the draft?

144 A. No, sir; we did take Mr. Whiting's draft on his brother for 3,000 dollars, & it went to the credit of William A. Whiting, agent. We took Whiting's draft sometime previous to this, & it went to the account or credit of William A. Whiting, agent.

Q. Was not this 3,000-dollar note given because of the failure of Whiting's brother to pay that draft?

A. It might have been. We didn't record it here for the reason that Whiting & Co. did not owe us anything.

Q. The fact that the account was kept William A. Whiting, agent, didn't make him agent for anybody?

A. We thought he was agent for somebody.

Q. Supposing the man had an individual account and a special account it would be put in as William A. Whiting, agent, & William A. Whiting, special; would not both accounts be to the same individual?

A. Yes, sir.

Q. Is not the word agent attached for the mere convenience of the bank and depositors so you might know what funds the check was drawn on?

A. Mr. Whiting had no individual account with us; no account but the William A. Whiting, agent, account.

145 Q. You took this note, as I understood, when you bought out Warren Hussey & Company?

A. Yes, sir.

Q. Didn't you buy that note individually?

A. No, sir; not at that time.

Q. Did you ever own the Whiting note?

A. That was an arrangement between Stanley & myself, & I don't know as it concerns this case.

Q. Didn't you tell Rockwell that it belonged to you individually?

A. I told him it fell upon me individually to look after it. Yes, sir; I think I wrote him that I individually would have to suffer if he did not pay it.

Q. Didn't that note come to you direct *to you* from Warren Hussey & Co.?

A. Yes, sir; it came to me.

Q. Didn't it come to you individually from Warren Hussey & Co.?

A. I don't know about that; it makes no difference.

Q. (Paper shown to witness) Whose writing is that?

A. I think I wrote that letter.

Q. That note referred to is no other than the Whiting note?

A. Yes, sir.

146 Q. Are the things stated in this letter true?

A. They are, sir, this far; when that letter was dated June 10th, 1870, Thatcher, Standley & Company did not go into existence till July the 1st, but we were looking over the affair, & it was supposed that I was ready to exchange that note, & it fell to my part in that action.

Q. Why didn't you say to Mr. Rockwell in this letter that he had promised pay it, instead of writing as you do here?

(Objection.)

A. I have no objection to any letter.

The plaintiff here offered in evidence a letter dated Central City, June 10th, 1870, as follows:

CENTRAL CITY, COL., *June 10th*, 1870.

W. B. ROCKWELL, Esq'r., *New York:*

FRIEND ROCKWELL: Your favor 1st rec'd, & contents noted. I have already had a full business talk with Mr. Cash, & he has explained his difficulties, &c., & I have already been aiding him whenever called on, & stand ready, as I have ever done, to give you & him all the

147 assistance I can. I am glad you are succeeding in your business arrangements. I, too, have accomplished my object, as expressed to you in confidence, & "Thatcher, Standley & Co." now own the entire business of Mr. Hussey at this place; purchase took effect June 1st, but transfer cannot be made public until July 1st, '70.

In the sale Mr. Whiting's note falls individually to me, & can't I rely upon something from that this summer. I feel I can count on your continued efforts. I assure you it would help me greatly if this debt could be added to my cr. in the new firm.

I am full of business & can't write more now; would be glad to hear from you again.

Very truly yours,

J. A. THATCHER.

Q. If Rockwell had made such a solemn promise to pay this note in 1868 to Warren Hussey & Company, why did you look to his continued efforts in the matter?

A. That pertained to the time he was making efforts to pay this note.

Q. You say he promised to pay this note in 1868?

148 A. Yes, sir.

Q. Did he sign it?

A. No, sir; his intimations were that he would finally pay this note.

Q. You say when he came to your office in 1875 that he said however grateful & willing he was, &c., that his circumstances would not permit him now to pay that money. What money was he talking about?

A. I didn't say pay that money at all; that was not my testimony.

Q. That he was poor & wanted me to pay back the money I received from Giddings.

A. Yes, sir, I didn't say pay me at all.

Q. I want it repeated now. State what do you mean when you say that Rockwell started off by saying "However grateful or willing," &c.

A. He said, "However grateful or willing he was that I should make this settlement & application I had made on the Whiting paper that

he was now too poor to pay the Whiting note, & wanted me to pay it back."

Q. Didn't he tell you he would sue you?

A. He threatened something of the kind in that letter.

149 Q. And you turned around and threatened suit on him on the Whiting note; didn't you know at the time Rockwell had not promised to pay it; that he did not apoligize to you?

A. I know that he did.

Q. You think that he did.

A. I know that he did.

On the redirect examination of this witness, he testified as follows:

Q. You stated that you had written very often in respect to this matter?

A. Yes, sir, & continually urging him to pay it.

Q. Here is one of the letters in which you asked him to pay it?

A. Yes, sir.

Q. How many letters of this kind did you write to him?

A. Not less than three or four; probably six.

Q. Did he ever deny verbally or by letter his liability upon this note?

A. No; he never refused to pay it.

Q. Never said he was unwilling to pay it?

A. Never.

150 JOSEPH MCCORD being duly sworn for the defendants, & examined by Mr. TELLER, testified as follows:

Q. Do you know the parties to this suit?

A. Yes, sir.

Q. Did you know Mr. William A. Whiting in his life-time?

A. Yes, sir.

Q. State whether you were intimate with the family. How intimate were you with the family of Mr. Whiting?

A. Mr. Whiting married my sister, & was my brother-in-law, & I was in the family. Mr. Whiting & Mr. Rockwell's families were living in the same house after they come to Colorado, & I was in the house that they lived in.

Q. Do you know anything about Mr. Whiting's making over or transferring, his property to Mr. Rockwell, &, if so, state when it was done, & for what purpose it was done, & how you know it.

Q. (By Mr ROCKWELL.) Of your own knowledge, or that you learned from Rockwell—not from Whiting.

A. I had a conversation with Mr. Rockwell in his office in re-
151 gard to the matter it was in 1867. Mr. Rockwell said there was a change in the agency of the Bullion Company; that he was agent? I had learned the fact before, from other parties.

Q. In the agency of the Bullion Company?

A. Yes, sir; that Mr. Whiting was no longer agent.

Q. Had Whiting been agent before that time?

A. Yes, sir.

Q. State what he said.

A. He said Mr. Whiting had conveyed his property to him to pay his debts—Whiting's debts; he mentioned some of the debts of Mr. Whiting.

Q. What did he mention?

A. He mentioned one that was due Mr. Whitney, & said Mr. Whitney had security; I believe he stated that.

Q. What else?

A. He mentioned several other debts; I think one debt due to a party in Illinois, & the debt due myself.

Q. Due from Mr. Whiting?

A. Yes, sir.

Did he mention this debt in question here?

152 No, sir.

Q. Did he say anything about how he was to realize on the property to pay these debts?

A. He mentioned some of the property that Mr. Whiting had. I recollect 85,000 dollars in the Bullion Company, or Consolidated Bullion, & $22,500 in the Inca Silver Mining Company, and he remarked that the Bullion Company's stock could be sold for 60 cents on the dollar, or that Mr. Whiting was offered that much for it, I forget which; that he had at one time been offered that, or that it was at one time worth that; I have forgotten which, & that that would have paid off all his debts & left him something handsome.

Q. Do you know anything about the value of the Inca stock?

A. I didn't know the value of either, except what he told me.

Q. Have you had occasion to look up the records & see what amount of property was conveyed to Mr. Rockwell at that time, mining property I mean now, & house & lot.

153 A. I had a copy of some of the property from the records of Clear Creek County of mining property, mill-sites, town-lots, &c., & it occupies 24 pages.

Q. Did you ever look at the records here?

A. Yes, sir; I have.

Q. Were the records of the same kind?

A. I looked over the records here hastily; I don't recollect very much about them; I recollect some of the property.

Q. Do you know whether William A. Whiting was the owner of a large number of mining claims, several hundred of them in this county.

A. I never looked over the records in this county with a view to ascertaining that fact with regard to mining property. I know he had interest in the Kansas, & a great many other lodes, with the title to them. As to the town-lots, I don't recollect the time I looked, whether the title was in him, or not. I know it was not in some cases.

Q. Was this property conveyed to Mr. Rockwell?

A. Mr. Rockwell told me he had conveyed all his property in the Territory to him.

154 Q. Did you have more than one conversation with Mr. Rockwell about that?

A. Yes, sir; I think I had several; but in none of which we went into the thing as far as in the first interview which I speak of. Still, I didn't know that there was any change in his mind in regard to it, he said he would go on & pay the debts after awhile.

Q. Do you know anything about his selling the property or any portion of it, receiving money for it?

A. I have heard of his selling.

Q. Have you heard from Mr. Rockwell?

A. I really could not say how I heard it.

On cross-examination of this witness by Mr. ROCKWELL for the plaintiff, he testified as follows:

Q. You've got a suit pending against Mr. Rockwell in this court?

A. I suppose I have.

Q. Whereby you are trying to establish as a fact, that all of this property was held in trust by Mr. Rockwell to pay Whiting's debts.

155 A. Yes, sir.

Q. Been pending three or four years?

A. I don't recollect how long; I suppose it is that long.

The defendants here introduced in evidence the deposition of Chancy N. Shipman, & same was read to the jury, as follows:

The caption & certificate of the same are omitted.

Interrogatory first. What is your name, age, residence, & occupation?

Answer to interrogatory first. My name is Chancy N. Shipman; my age, is sixty-four years; I reside temporarily in the city of Chicago, county of Cook, & State of Illinois, but my legal residence is Georgetown, Colorado. My occupation is mining, interested in mines.

Interrogatory second. Do you know the parties plaintiff & defendant, or either of them; if yea, for how long have you known them?

156 Answer to interrogatory second. I know Mr. Rockwell & Mr. Thatcher. I see Mr. Standley is included. I met him in A. D. 1876. I have known Mr. Rockwell since A. D. 1874, & I first met Mr. Thatcher in A. D. 1869.

Interrogatory third. Did you ever have any business relations with the plaintiff; if so, state fully what relations you had, when it was, & where you & the plaintiff resided at that time?

Answer to interrogatory third. Yes; I have had business relations with the plaintiff, commencing in A. D. 1866, & ending in A. D. 1872; the relations between myself & plaintiff were this: I purchased an undivided one-half interest in all the mining property he owned at that time in the Territory of Colorado. At the time I made the purchase my home was in Chicago, Illinois, & I was interested in business at Cairo, Illinois, where the plaintiff resided. In the early part of the season of

157 A. D. 1866, I think in the month of May or June, he went to Colorado to reside. My home was in Chicago, Illinois, until April, A. D. 1875. Since that time I have made Georgetown, Colorado, my residence.

Interrogatory fourth. Did you ever know one William A. Whiting; & if so, for how long, & when, & what relation did he hold to the plaintiff, where did he reside, and in what business was he engaged?

Answer to interrogatory fourth. I did. I first met him in the winter of A. D. 1866, I think. He was plaintiff's father-in-law; he resided in Central City, Colorado; he was engaged in mining.

Interrogatory fifth. Do you know anything about any transfer or assignment of mining property, building lots, mining stocks, or other property by the said Whiting to said plaintiff in trust or otherwise; if so, state fully and particularly all you know about it, when it took place and for what purpose made, & from whom your information was

158 derived, & if it came by letter or in writing, in anywise attach a copy of such letter or writing to your deposition, if you have it, & if in writing, & you have not the original or a copy thereof, state particularly what has become of the original, whether lost or destroyed, & whether you have or have not made search for it, & what the result of the search was.

Answer to interrogatory fifth. I do. Mr. Rockwell told me that he had purchased all Mr. Whiting's mining property, building lots, mining stocks, & other property owned by said Whiting & afterwards wrote me to the same effect. I think this was in the fall of A. D. 1867. Mr. Rockwell told me this at my office in Chicago, Illinois. In the first place I will state that when I made my purchase from Mr. Rockwell, he was bound to me by a contract to devote his whole time & attention to our business interests in the Territory of Colorado, & not deal in mining property or stocks outside of our interests. At the time he informed me of this purchase from Whiting, he said that he had no time to communicate with me before closing it, & he felt quite sure
159 with all the facts before me, that I would have consented, that it would place him in a much stronger position by holding all this property; that it would not occupy any of his time or require any funds beyond what he would receive from the proceeds of this purchase from Whiting. That Mr. Whiting would give his time and attention to this property, the same as before the purchase. The reason given by Mr. Rockwell to me for making this purchase, was that a Mr. Whitney, of Boston, Mass., was about to foreclose a mortgage for some $30,000, covering all of Whiting's property included in this purchase, valued at some hundreds of thousands of dollars, & that the foreclosure of said mortgage would turn him (Rockwell) out of a home as he lived with him (Whiting) his father-in-law. At the time I had the interview with him at my office in Chicago in reference to this purchase from Whiting, he was on his way East, to Boston, expecting, as he told me to make a sale of mining property belonging to us, when he agreed to remit to
160 me the whole amount received for said property his portion to apply on account of money he owed me, money loaned. He failed to remit his portion, claimed to have paid it on account of Mr. Whiting's indebtedness unexpectedly. Upon receipt of his letter making this latter statement the way he had used the money, &c., I wrote him charging him with having violated his contract with me by making said purchase of Whiting's property & using funds when he had told me that he should not be obliged to use one dollar from any means outside of the Whiting property, or money received from the Whiting property or purchase. In answer to this letter of mine he stated in writing all that he had told me at the former interview at my office in Chicago, & in that letter to me said that the purchase from Whiting was bona fide, to use his words: "It is a bona fide purchase to be mine forever," & here repeated what he had said, namely, that Mr. Whiting would give his attention to the property the same as before the sale, that it
161 would not be necessary for him (Rockwell) to give any time personally to this property. Some time later I had occasion to write Mr. Rockwell and complained as before that he was devoting his time to the Whiting property & neglecting ours, & charged him again with violating his contract with me in making said purchase from Whiting. In answer to this letter he wrote me denying positively ever having made any such purchase, or that he had ever told me anything of the kind or written me anything to that effect. I will here state that the first letter was written from Cairo, Illinois, & was not copied into the letter-book. The second letter denying all that he had said or previously written was written from Central City, Colorado, & copied in the letter-book. I know this from the appearance of the two letters, the first letter not being blurred, as if it had been copied, & the latter showed plainly that it had been copied from the spreading of the ink & its general appearance. Sometime later, Mr. Rockwell on his

162 return from Boston, called at my office in Chicago, when I made an appointment to meet him at the Briggs House, Chicago, where he was stopping. I called there taking with me the two letters before mentioned that he had written me from Cairo, Ill. & Central City, Colorado, before producing the letters, I asked him if he did not recollect telling me in my office in Chicago, that he had made a purchase of all this property from Whiting, and confronting him with all the facts that he had told me in regard to it. He replied no; said that he could not have told me so, "for such was not the fact," that he had not purchased this Whiting property, & of course could not have told me so. I then produced the Cairo letter which stated that he had purchased the property, that it was a "bona fide" purchase, & that the property was to be his forever. He read the letter as I held it in my hand. He said that I might construe it in that way (that he had made the purchase) but that he had not made the purchase, but simply held it as security & in trust.

163 These letters of Rockwell, to me, were destroyed by fire in the great fire in Chicago, October 9th & 10th, A. D. 1871. My other papers, contract with Rockwell, &c., statements of accounts furnished by him, deeds, &c., were placed in a vault and were not burned.

Interrogatory sixth. Do you know any other fact that may be of use to the defendants on the trial of this cause. If so, state the same as fully as though you had been specially interrogated in relation thereto.

Answer to interrogatory sixth. I don't think of anything more.

Cross-interrogatories & answers thereto by the witness on the part of the plaintiff:

Cross-interrogatory first. If in answer to the third direct interrogatory you say you and the plaintiff have had business relations, state if Rockwell was not to give his undivided attention to such business to the exclusion of all other matters.

164 Answer to first X-interrogatory. Yes; he was.

Second cross-interrogatory. If in answer to the 5th direct interrogatory you say you did receive a letter from Rockwell relating to the purchase by him of certain property & stocks of Wm. A. Whiting, state if you did not receive at least two such, & please attach the original or copies thereof to this deposition, & if you cannot attach the originals or copies & the originals, will you please state as near as you can the substance of each of the letters relating to such purchases.

Answer to second cross-interrogatory. I received but one letter stating that he had purchased the property of Wm. A. Whiting. Prior to writing said letter he told me verbally that he had made such purchase. I also received another letter stating that he had not made the purchase, afterwards denying that he had ever told me that he had made such purchase.

Third cross-interrogatory. Do you not know that Rockwell
165 purchased the property & stocks of Wm. A. Whiting absolutely as his own, & that he did not hold any part or portion thereof in trust for said Whiting or for said Whiting's creditors.

Answer to third cross-interrogatory. I only know from his verbal statement & subsequent letter that he did purchase said property & stocks of Wm. A. Whiting, & in another letter to me sometime later than the above that he did not purchase it, but only held it as security & in trust.

Fourth cross-interrogatory. Did not Rockwell say to you that the letter to you in which he referred to this purchase from said Whiting

as being in trust for Whiting's benefit was untrue & incorrect, that the purchase was bona fide & not in trust for anybody & don't you know that such was & is the fact.

Answer to fourth X-interrogatory. He did not say anything to me to that effect, subsequent to his last letter to me denying the purchase, until I met him in Colorado sometime during the year A. D. 1875
166 & 1876. I do not know of my own knowledge that such was & is the fact.

Fifth cross-interrogatory. Have you not acted toward Rockwell & conducted your business relations with him ever since the purchase by him from Whiting, upon the theory that such purchase was an absolute one, and made for Rockwell's benefit alone?

Answer to fifth cross-interrogatory. I don't know as I have made any difference as regards our business relations on that account. He having stated that it was a bona fide purchase, & subsequently that it was not a purchase but only held by him as security & in trust.

Sixth cross-interrogatory. Do you know of any other matter or thing in relation to this matter which will be of benefit or advantage to the plaintiff in this controversy; if yea, state & set forth the same as fully & at large as though you were again particularly interrogated with reference thereto.

Answer to sixth cross-interrogatory. I think of nothing more.

CHAUNCEY N. SHIPMAN.

167 W. B. ROCKWELL recalled.

Q. (By Mr. TELLER.) Do you know when William A. Whiting died?

A. Yes, sir; in May, 1871.

JOSEPH MCCORD recalled.

Q. (By Mr. ROCKWELL.) These conveyances you looked up in Georgetown were the same as those described here, were they not?

A. I couldn't tell about that.

Q. It showed absolute title?

A. Yes, I guess it was.

The defendants here introduced in evidence the plaintiff's petition in bankruptcy, or so much of it as showed the statement made in the bankruptcy proceeding about the claim in dispute in this suit, & same was read to the jury, as follows:

IN THE MATTER OF }
WATSON B. ROCKWELL, BANKRUPT. }

SCHEDULE A. No. 2.—*Creditors holding securities.*

Lewis C. Rockwell, att'y, Central City, Colorado.

Interest in claim against Jos. A. Thatcher; suit pending in
168 dist. court Gilpin County, Colorado. Value of security claim, $1,400. Amount of debt, $455.

WATSON B. ROCKWELL,
Petitioner.

SCHEDULE B. No. 3.

IN THE MATTER OF
WATSON B. ROCKWELL, BANKRUPT.

Choses in action.

* * * * * * *

Suit pending in dist. court Gilpin County, Col., against Jos. A. Thatcher, of Central City, Col., to recover $2,800 & interest, in which the petitioner has a half interest. * * *

WATSON B. ROCKWELL,
Petitioner.

WATSON B. ROCKWELL being recalled for the plaintiff in rebuttal, & examined by Mr. ROCKWELL, testified as follows:

Q. Is my claim any different from your schedule?

A. I cannot tell exactly; I knew when I made my assignment to you. I took your account as you showed it to me on your books,
169 which I considered to be correct. I made the assignment in accordance with that; I don't know when I made it, I did not make any minute of my assignment to you. You had previously written to me, & I though' your account correct, & I made it out in accordance with your last bill that you gave to me.

Q. You heard Mr. Shipman's deposition, didn't you?

A. Yes, sir.

Q. Explain why you wrote that letter which he says is lost, about denying you made a purchase.

A. Mr. Shipman was charging me with having violated my agreement with him by purchasing the property of Mr. Whiting. Our agreement was that neither of us should purchase mining property without the consent of the other, but Mr. Whiting was owing Mr. Whitney the sum of nearly $27,000—$26,000 & something. Mr. Whitney came here & said he had come for a settlement, & was going to foreclose the mortgage on the house we lived in, & that he should dispose of all the property he held for the payment of this debt. He proposed to me, within two or three days after he came here he made a proposi-
170 tion to me, that if I would assume this debt of Whiting's to him——

Q. Mr. Whitney made that proposition.

A. Yes, he came here and was going to foreclose on the Whiting property he held as security for this claim against Mr. Whiting; he was going to foreclose the mortgage on the house in which we were living, & he held a mortgage on the mining stock & claims. He said he would foreclose the mortgage at once, and dispose of the mining claims and stocks as he did not dare to let it run any longer, in consequence of the character & value of that kind of stock & claims; that they might depreciate in value; the matter was forced upon me in that way; he pro'sed to me to assume the debts of Whiting to him & he would give me two or three years' time to pay, at the same time I must take of Mr. Whiting all the property he held as security then, & he must transfer the same to me, so he could hold the same as security he had held & my personal obligation besides. I had no time to communicate with Mr. Shipman to obtain his consent to that arrangement.

171 Q. Explain why Mr. Shipman charged you with bad faith in making this purchase.

A. I will say further, in relation to this, that I told Mr. Whiting distinctly at that time, & Mr. Whitney, I bought it, & without any conditions whatever; there was no condition asked, but for fear we might think there was a condition he said he would have no condition, it should be an absolute sale. I wrote that to Mr. Shipman.

In regard to this question, you asked how I came to write that letter. I will say that I think Mr. Shipman must have forgotten or misconstrued something. I never denied that I purchased it. I remember very well of trying to have him see that the charge of violation of my obligations with him was wrong, & I wrote to him saying I didn't buy it as a speculation, & explained that I took it because of the position in which Mr. Whiting was placed. I wrote him that in the first place. I remember saying it was more as a security than as a purchase, although it was an absolute purchase & transfer. I desired Mr. Shipman to look upon it in that light. I have no recollection of de-

172 nying buying it; he might have understood it in that way, because I said it was a security, & he might have understood that I denied I purchased it, but I didn't intend it to have that meaning.

Q. State whether you ever told any living man that you took that property in trust for the purpose of paying Mr. Whiting's debts, or ever promised to pay Mr. Whiting's debts?

A. I never told any man I had promised to pay anything except the Whitney debts. I never promised to pay any other debts.

Q. Did you hear Dr. McCord's testimony?

A. I did.

Q. Did you have a conversation with him at any time wherein you told him you held that property in trust?

A. I never told him that I held that property in trust. I remember having a conversation with him at my house, at the gate, when he first heard that the transfer was made. He asked me how it was. I told him I had bought Mr. Whiting's property; then he referred to his claim against Mr. Whiting & said then he would probably lose it.

Q. Was he friendly then?

173 A. Yes, apparently; he is the uncle of my wife. I remarked to him at the time, if I made as much out of it as I hoped to, or if it was worth $100,000, or if I realized as much as that from it, I will pay you this claim.

Q. How much was Whitney's debt at that time?

A. $26,500.00, lacking a few dollars.

Q. Did you make anything out of it?

A. I did not. It was the indirect cause of my bankruptcy.

(To this question & answer the counsel for the defendant here objected, & the objection was sustained.)

Q. Passing from Dr. McCords to Mr. Thatcher. You say Mr. Thatcher spoke about a promise you made to Mr. Palmer, of Warren Hussey & Company, to pay a debt of Whiting's?

A. Yes, sir, he spoke of it.

Q. Do you know how the Whiting debt occurred?

A. I don't know, except what Mr. Whiting told me.

Q. Were you ever a partner of Wm. A. Whiting or J. Parker Whitney?

A. Neither, directly or indirectly.

Q. Were Whitney and Whiting partners?

174 A. I don't think they were. I know they were working to-

gether & owned Whiting property together, & sold it & organized companies, &c. I understood from Mr. Whitney that they were not partners.

Q. At the time you purchased that property or afterwards, state whether or not that property had a value. What kind of property did you get from Mr. Whiting?

A. Undeveloped mining claims, most of it.

Q. How many?

A. In different localities, probably one thousand or more claims.

Q. State whether these claims had any marketable value.

A. They did not; they had no marketable value.

Q. Did the stocks have a marketable value?

A. I don't know but it might have been sold for something at that time; it was not in the market. I know they made a corner of it in New York and run it up $2, $3, or $4 a share, but it was not quoted in the market at that time.

Q. Nor while you owned it?

A. No; nor during my ownership of it.

175 Q. You heard Mr. Thatcher state about your promise to pay the Whiting debt; state how it was.

A. I came into the bank—I remember it very distinctly—I came to Hussey & Company's bank. Mr. Thatcher and Mr. Frank Palmer were standing in front of the counter. Mr. Thatcher introduced me to Mr. Palmer, & we had some little conversation, & Mr. Palmer asked me about the claim of Whiting's. They held Whiting's note for $3,000, & he spoke of my making some kind of a promise to Thatcher to pay it, & I stated to him what kind of a conversation we had about it.

Q. What did you state to him?

A. I told him that Mr. Thatcher spoke to me about it when he found out that this property of Whiting's was made over to me. I met Thatcher at the bank and he asked me how it was. I told him it was so, I had bought Whiting out. He said, "We hold a note of $3,000 against Whiting," & he wanted to know what the probability was of his paying it. I told him I did not know about it. We had further conversation about the property, & at the close of the conversation I

176 made the voluntary remark to the effect that if I realized a large amount out of the sale of the property, or as much as I hoped to, or something of that kind—I don't know what qualification I did give it—I would see that he did not lose anything. It was a voluntary remark, based entirely on purest friendship. I don't think Mr. Thatcher—in fact, I know he never—asked me to pay it. He did claim that it was proper for me to pay it, at that time.

Q. Did Mr. Palmer ask for security from you?

A. Mr. Palmer referred to the conversation I had with Mr. Thatcher, & asked me if I would not agree positively to pay that note. They were about to make some change in the banking concern. I understood that Warren Hussey & Co. were going to sell out, & they wanted to put that in shape so they could count upon something definite, & he asked me to pay it. I told him I would not; that I was under no obligation to pay it. He asked me if I would agree to pay it in writing. I then firmly told him I would not. Then he asked if I would agree to pay some part of it in writing if he would give up the Whiting note, but I refused to do it.

177 Q. Did you ever promise any one in the world to pay that Whiting debt, either in writing or verbally?

A. I never did.

Q. Did you hear Mr. Thatcher's statement in regard to the conversation in the First National Bank in which you expressed yourself satisfied with the application of the money you sent to Giddings?

A. I believe I did.

Q. Did you hear my cross-examination?

A. Yes, sir.

Q. State to the jury what there was of that conversation.

A. I had previously written a note to Mr. Thatcher demanding a return of this money, with interest; but, hearing nothing from him, I called at the bank, & he asked me into the back room. We had some conversation, & he expressed himself hurt at the course I had taken in asking him to pay it back; he referred to his friendship for me, what he had done for me formerly, & especially in getting this money from Professor Hill; he laid great stress on that point; that he had
178 got the money to pay this $10,000, otherwise the probability was that I would have had to pa*id* it, & he thought I ought to be satisfied to let him have this $2,820.00, especially in consideration of that. I didn't express myself satisfied with the disposition he had made of it.

Q. Did you ratify the disposition he made in any way, shape, or manner?

A. I did not. In the first conversation at his house I was greatly surprised, & the first thought I had when I heard him relating what had taken place was that I would hear all I could without saying anything. I made no reply whatever, other than simply to say that I understood what he said. The last thing he did was to show me the note. I said, "Yes, I see." My desire then was to get all the information on the subject I could before taking any action.

Q. You heard the testimony of Mr. Thatcher about your promising to pay that note. State again whether you are positive in your statement when you say you never promised to pay that Whiting note to anybody in the world.

179 A. Certainly I am positive.

Q. And also about not ratifying the application of that money?

A. I never ratified it in way.

Q. You cannot be mistaken in either of these statements?

(To this question the counsel for the defendant here objected, & the objection was sustained.)

Q. State if you have got any portion of that letter which you wrote to Mr. Thatcher in which he says you said, "However grateful, willing," &c.

A. Yes, sir; I made a copy of the letter I wrote to him (witness here produced a paper); there is only a little of the last of it here.

Q. You say this is a portion of the copy of the letter you wrote to him?

A. Yes, sir; the latter portion of it.

Q. State what conversation you had with Mr. Thatcher about forbearing suit on the other note for $736.00 made by you & your wife.

A. About sueing?

Q. Forbearing to sue.

180 A. There was not a word said about sueing on the note.

Q. Not a single word?

A. Not a word.

Q. Did Mr. Thatcher in that conversation say if you would act decently about the application of this money that you & your wife could have your own time to pay that $736.00 note?

A. If he used such language I did not hear it.
Q. Was there any such agreement made?
A. Nothing of the kind. There was nothing said about suing. He gave me notice, or Frank Young sent me notice, that the note was due at the bank, & to give it attention. I went & gave it attention by paying him. That was all I knew about the note.
Q. About when was this?
A. I cannot recollect the date; some time after I returned from England. I recollect he remarked that he didn't wish to mix up the business of the bank with this note, & he gave me to understand that this $3,000 affair was a personal matter.

181 The plaintiff here offers in evidence a copy of part of letter written by Rockwell to Thatcher, & read the same to the jury, as follows:

"Whatever disposition I might have to pay Mr. Whitney's debts were I in different circumstances, my present financial condition is such that I cannot consent that you should apply the amount I paid you upon the Cash & R. notes to the payment of your claim against the estate of Mr. Whiting, & I must now ask you to return to me that amount, with interest thereon at the rate of 18 % per annum.

"CENTRAL CITY, COLO., *May 22d*, 1875.

"JOSEPH A. THATCHER, Esq.,
"*Central City:*

"DEAR SIR."

Q. Is that a portion of the letter Mr. Thatcher said he had lost that you wrote to him for, which he says you were apologizing for writing?
A. Yes, sir; that is what there is upon this page.
182 Q. You heard Mr. Thatcher say you were apologizing for writing this letter?
A. Yes, sir.
Q. Was that true?
A. It was not true. I certainly never apologized for writing it.
Q. You heard Mr. Thatcher's statement, in which he said that the account which Mr. Whiting had as agent in his bank was credited with $3,000 at your request. Did you hear him testify to that?
A. Yes, sir.
Q. Is it a fact that you had a penny's worth of interest in the account—was credited with that sum of money?
A. No, sir.
Q. Were you interested in the account of Whiting, agent?
A. I had no interest whatever, directly or indirectly, in that account.
Q. Were you present when Mr. Thatcher says that you and Mr. Whitney came to Warren Hussey & Company's bank & asked them to take Whiting's note for $3,000, and credit his account with the same?
A. Whiting & I never went there with that purpose. I don't know that we ever went to the bank together.
Q. Did you promise that you would pay the Whiting debt?
183 A. I never made such a promise.
Q. Did you know when the note was being given?
A. No, sir; I did not.
Q. Did you know anything about before it was given?
A. No, sir.

On the cross-examination of this witness by Mr. TELLER, for the defendant, he testified as follows:

Q. Where did you find this letter?
A. That piece?
Q. Yes, sir.
A. Among my papers.
Q. When did you find it?
Q. I have it all the time.
Q. What did you do with the other half of it?
A. I don't know.
Q. How much more did you write than this?
A. I think, perhaps, another page.
Q. Do you remember what you said on that other page?
A. No.

184 Q. You said Mr. Young wrote you a letter, calling attention to your notes, & you went there and paid them. When did Mr. Young call your attention to it?

A. I don't know recollect the date of these notes or the time of maturity.
Q. When did Mr. Young call your attention to it?
A. I can't give the date.
Q. As well as you can?
A. I can't give the date.
Q. Before or after you sent this letter to Mr. Thatcher?
A. I think it was after that.
Q. You say you went there & had a conversation with Mr. Thatcher in the back room. When was that?
A. A few days after I wrote this letter.
Q. At that time was the $736 note standing against you?
A. Yes, sir.
Q. When did you pay the $736 note?
A. I can't recollect the time of payment.
Q. How long after the conversation between you & Mr. Thatcher?
A. I can't tell whether they were renewed after that or not. I think they paid some little time after that.
Q. Some weeks after?
A. I think so.

185 Q. What did you say? Did Mr. Thatcher say anything to you about receiving such a letter from you?

A. Yes, sir.
Q. State what you said in reply.
A. I don't remember the exact language I used.
Q. Didn't you say you were feeling depressed & poor, & was sorry you wrote such a letter?
A. I didn't. I was sorry. I don't know but I said I was sorry that I hadn't come to see him.
Q. Mr. Thatcher didn't tell you if you acted decently & fair about this matter this $736 note could run along?
A. He used no such language to me at all that I heard.
Q. You say you never promised to pay this Whiting note?
A. I did say so.
Q. What do you say in regard to Thatcher calling your attention to it & asking you to do something on the note? How many such requests did Mr. Thatcher make of you, to your knowledge?
A. He spoke to me about it different times—three or four different times.

Q. He wrote to you about it?

186 A. He wrote to me once. I have no recollection of any other letter but that one.

Q. You didn't make any answer to that at all?

A. I don't remember whether I did or not.

Q. Did you ever deny to Mr. Thatcher up to this time your liability on that note?

A. I denied it to Mr. Thatcher and to Mr. Palmer at the time we had our conversation.

Q. Since the time Mr. Thatcher was asking you for the money, writing for the payment of it, have you, either by letter or otherwise, denied your liability on this note?

A. Mr. Thatcher never claimed, until after he made the application on that note, that I was positively liable. He referred frequently to my voluntary promise that I made in the first place.

Q. He asked you to pay in that letter?

A. Yes, sir.

Q. Did you ever deny, in response to Thatcher, that you were liable?

A. I don't know that I did.

187 Q. You say you received this property in security; what was the agreed price you were to pay for this property?

A. I was to pay the debt he owed J. Parker Whitney.

Q. How much?

A. $26,495; I believe it was a little over $26,500, & I agreed to pay besides that, at the bank here—which I suppose Mr. Thatcher had reference to—between $1,500 & $1,600 that Whiting had overchecked at the bank, & used the money belonging to the Bullion Company for his own personal purposes, & when Mr. Whitney come for this settlement Mr. Whiting informed me that his account was overdrawn—at least he had more checks out than he had money to meet, some $1,500—& I went to Mr. Thatcher & made arrangements to pay that by giving my draft on New York, payable in sixty days—I believe thirty or sixty—for that amount, & that was credited to Whiting, & that amount I paid, besides the Whitney's debt.

Q. You went to Whitney & made that arrangement?

A. To Mr. Thatcher.

Q. You agreed to pay this $1,500?

188 A. I agreed to pay that $1,500 that he had overdrawn at the bank. I agreed to pay that; that was part of the agreement. I agreed to pay that & the Whitney debt.

Q. You say Whitney's account as agent was overdrawn?

A. He told me it was. He told he had checks out to that amount & he had not the money at the bank to meet them. Whiting told me this.

Q. I understood you to say that you made arrangements to pay this amount, $1,500?

A. Yes, sir.

Q. Did you know this property he received from Whiting was in Bullion stock?

A. Yes, sir.

Q. How much was there?

A. 75,000 shares, I think.

Q. Did you subsequently sell that stock?

A. Yes, sir.

Q. How much did you receive for it?
A. $25,000.
Q. Any Inca stock?
A. 22,500.
Q. Did you subsequently sell that?
A. No; it is in the hands of my assignee.
189 Q. You say that you think there were 1,000 mining claims?
A. Yes, sir; I think there were.
Q. Where were they situated?
A. There were lodes in all parts of the Territory—two claims on the Kansas.
Q. Some on the Peru?
A. None.
Q. Any village lots here?
A. The lot we live on in Lawrence street.
Q. What has been done with that property—the house & lot?
A. The house & lot on Lawrence street has been disposed of to Mr. Henry Luneis, of Vermont.
Q. For how much?
A. For $3,000.
Q. Any mill-sites?
A. Yes; a good many.
Q. Did you sell any of these?
A. All of them.
Q. For how much?
A. Not much. I don't know whether you would call it a sale or not. All of the mining claims & mill-sites I put into a company & stocked it in New York City for a large amount. There was never a share of the stock sold to my knowledge. I never sold my interest in it.
190 O. You hold the stock still?
A. No.
Q. You had it at one time?
A. Yes, sir.
Q. It has passed out of your hands now?
A. Yes, sir.
Q. How much stock did you have?
A. I think the company was organized for $2,000,000, & I held a portion—something like one-eighth, I think.
Q. $250,000 of that stock?
A. Yes, sir.
Q. You say you never told Mr. Shipman you held the property as security?
A. No; I didn't say so.
Q. What did you say?
A. I said I tried to have Mr. Shipman to look upon it in that light, because he complained of me for violating my agreement with him by buying, & I wanted him to look at it as security, that the bases of the transaction was not so much the buying mining property to speculate as taking it in trust as security, as I bought the property because it was by the condition of things forced upon me in that way. That was the transaction.
191 Q. Did you say you wrote a letter to Mr. Shipman saying it a bona-fide purchase, at first?
A. Yes, sir.
Q. And afterwards denied it was a bona-fide purchase?

A. I did not deny that it was a bona-fide purchase. He might have inferred that I denied it by my stating that I took it as security.

Q. What was the name of the immense $2,000,000 stock company?

A. The Colorado Smelting and Milling Company.

Q. You had one-eighth of the stock. What became of that stock?

A. It was never in my hands. Whitney held it, I think, or some one else.

Q. Who was it issued to?

A. To me.

Q. What became of it?

A. It is of no value whatever.

Q. What did you do with it?

A. I don't know.

Q. Did you put it in with the assets in bankruptcy?

A. I don't know about that; I think not.

192 (To this question and answer the plaintiff, by his counsel, here objected, on the ground that it was immaterial, & the objection was sustained.)

Q. You never told Dr. McCord that you took this property to pay Whiting's debts?

A. I presume I told him I was to pay the Whitney debt, but I never told him I would pay his debt.

Q. Of the debt in Illinois?

A. I never heard of any debt in Illinois.

Q. To Mr. Justin, or Dustin; did you know of any such debt as that?

A. I don't know; I think I have heard something said about a Mr. Dustin, of Whiting owing Dustin, but I have no recollection of agreeing to pay it, or of anything being said to me about it.

On the redirect examination of this witness by Mr. ROCKWELL for the plaintiff, he testified as follows:

Q. State how much deduction there would be if the money was paid on the 11th day of February, 1873, instead of in December.

A. The total sum due, deducting interest for one month & a third of a month, would be $4,127.19.

193 The plaintiff here offered in evidence the deposition of J. Parker Whitney, and the same was read to the jury as follows; caption & certificate are omitted:

Interrogatory first. What is your name, age, & place of residence?

Answer to first interrogatory. Joel Parker Whitney; age, 42; reside at Rocklin, California, but am now residing temporarily in Boston.

Interrogatory second. Do you know the parties, plaintiff & defendants, in this cause, or either of them; if yea, how long have you known them, respectively, or such of them as you do know?

Answer to interrogatory 2nd. I know Rockwell, the plaintiff, and Thatcher, one of the def'ts, but don't know Standley; have known both of them from ten to twelve years.

Int. 3d. Were you ever in Colorado? If so, when, how long, & did you know William A. Whiting, father-in-law of the plaintiff in this case; if so, when & how long?

194 Answer to int. 3rd. I was in Colorado in May, 1865, remained there six or eight months, & knew William A. Whiting at Central City from 1865.

Int. 4th. Did you ever know a firm doing business in Central City,

Colorado, composed of yourself, Watson B. Rockwell & William A. Whiting, under the firm name & style of J. P. Whitney & Co.?

Answer to int. 4th. No, sir; no such firm ever existed.

Int. 5th. Did you ever know a firm doing business in Colorado under the firm name and style of J. P. Whitney & Co.? If yea, who composed that firm? When did it do business in Colorado & what kind of business did it do, & when & how long did it continue in business?

Answer to 5th int. I do not know of any such firm. If Mr. Whiting used any such firm name it was unauthorized by me. I owned
195 mining property with him. That is he gave me a half interest for a certain amount of profits which I might make. This agreement was made in 1865, & continued until Rockwell purchased the interests of Whiting.

Int. 6th. Was Watson B. Rockwell ever a partner of yours in business in Colorado. If so, when, where, how long, & what business did you do?

Answer to 6th int. He never was.

Int. 7th. State whether or not on or about the 8th day of November, 1867, or at any other time you charged William A. Whiting with drawing out of the partnership funds of the firm of J. P. Whitney & Co. any money. If so, how much, & using the same for purposes of his own or for purposes unauthorized by you? If so, please state fully?

Answer. I never charged him with drawing out partnership funds. I had nothing to do with his financial accounts in Colorado. He continually overdrew on me, until I refused to furnish any more money. He finally owed me about twenty-five thousand dollars when he sold out to Rockwell.

196 Int. 8th. If, in answer to the last interrogatory you answer in the affirmative, state whether or not you or Watson B. Rockwell objected to the banking-house of Warren Hussey & Co. charging you or the firm with such sum or sums thus wrongfully drawn out by Whiting?

Answer to int. 8th. I have not answered in the affirmative.

Int. 9th. If, in answer to the 7th direct interrogatory you say, Whiting did wrongfully draw and use money, not his own, state from what or whose account such money came, & how much & when it was thus drawn & used?

Answer to 9th int. I did not state that he drew money wrongfully. He overdrew on me.

Int. 10th. If, in answer to 7th direct interrogatory you say said Whiting did drawn & use any money, from any account, state when it was, how much did he thus draw, & was or was not Watson B.
197 Rockwell in any way or manner interested in such account. If yea, in what way, please state fully?

Answer. He overdrew from me. Rockwell had nothing to do with it.

Int. 11th. If, in answer to any of the foregoing interrogatories you say Whiting did use money not his own from some account, state in whose bank such account was kept, & whether or not you or any one for you, or the persons interested in such account, insisted or objected to the bank charging or debiting such account with the amount thus wrongfully drawn out by said Whiting, or whether or not you insisted or requested the bank to take said Whiting's note for such amount, & if it did, that you, or youself & Watson B. Rockwell, would see it paid or see that the note was paid? If yea, state fully everything & all that was said in relation to the matter.

Answer to 11th int. I remember that Whiting kept his account in a

banking-house in Central City in which I saw Joseph A. Thatcher
198 who was employed or interested there. I think the banking house was Warren Hussey & Co. Never knew anything about their charging for money wrongfully drawn, excepting that when Whiting sold out to Rockwell I was told by Whiting that he was indebted some 3,000 to said banking house. I never knew of any note by Whiting to the banking-house, & I never agreed to see any note of his paid & never knew that Mr. Rockwell did.

Int. 12th. If, in answer to any of the foregoing interrogatories, you say said Whiting did use some money wrongfully drawn out of some account, in which you was interested, state whether Hussey & Co. took the note of said Whiting for that sum or any portion thereof; &, if so, did you or yourself & Watson B. Rockwell, or Rockwell alone, ever promise Hussey & Co. that you & he, or Rockwell alone, would see that the note was paid? If you answer yea, please state fully in regard to the same, & all that was said in regard to the matter.

199 Answer to 12th int. I stated that Whiting overdrew on me & that he informed me that he was owing the banking-house where he kept his account. I did not know of any note of his given & did not myself, or know that Rockwell promised to pay any.

13th int. Did you ever, at any time or place, hear Watson B. Rockwell promise Hussey & Co. or any one for them to pay any part or portion of any indebtedness which was due from William A. Whiting to said Hussey & Co. If you answer yea, please state fully when & where such conversation took place & what was said by said Rockwell at that time in regard to the matter.

Answer to 13th int. I never did.

14th int. Did you & Watson B. Rockwell ever promise Hussey & Co. or any one for them to pay any sum of money or to pay any note which said Whiting owed Hussey & Co.? If you answer yea, please state when you did it & what was said regarding such promise & to whom it was said.

200 Answer to 14th int. I never did & never knew of any such promise by Rockwell.

15th. Did Hussey & Co. or Joseph A. Thatcher or any one for them ever ask you to pay any note which said Whiting may have given the bank of Hussey & Co.? If so, when was it; what was said; & who made the request?

Answer to 15th int. No.

16th int. Do you know of said Whiting on or about Nov. 8, 1867, making & delivering to Hussey & Co. his note of three thousand dollars, or for any other sum? If yea, state fully & minutely all you know about it, & all the circumstances (if any) connected with the giving of this note, & what way or manner if at all you & said Rockwell were connected with the giving of this note?

Answer to 16th int. I don't know anything about it.

201 17th int. If, in answer to any of the foregoing interrogatories, you say you do know of William A. Whiting giving to said Hussey & Co. his note for some money he had drawn from some bank account in their bank, please state whether or not any bank account, in which you were interested was in any way affected by said Whiting's giving his note? If you answer yea, please state in what way it was affected?

Answer to 17th int. I have answered that I did not know of any such note & no bank account of mine was affected by any such note.

Int. 18th. Was or was not the bank account of J. P. Whitney & Co.

or any other bank account to your knowledge, credited with the amount of three thousand dollars or any other sum in consequence of Whiting's giving the banking-house of Hussey & Co. his note? If you answer yea, state fully in regard to the matter.

Answer to 18th int. I do not know.

202 Int. 19th. State whether or not you & Rockwell ever at any time, place, or spot promised or agreed to or with Hussey & Co., or with any one for them, to pay or to see paid a note for three thousand dollars, or for any other sum which said Whiting had given to the bank. If you answer yea, state fully in regard to the same, & under what circumstances such promise or agreement was made.

Answer to 19th int. I never did so promise, & never knew that Rockwell did.

20th int. Was said William A. Whiting ever indebted to you in any sum whatever; if yea, to what extent, by what was it evidenced, if anything, & was it ever paid; if yea, by whom & where?

Answer to 20th int. Yes; in sundry sums, amounting in all at the time of its payment to me by Rockwell to about twenty-five thousand dollars. It was evidenced by an acknowledgment in writing to me from Whiting.

203 21st int. Do you know of William A. Whiting & Watson B. Rockwell ever having any business transactions together regarding the indebtedness from said William A. Whiting to you; if you answer yea, state fully & particularly in regard to the same?

Answer to 21st int. Yes; I repeatedly pressed Wm. A. Whiting to pay the indebtedness due me. I made considerable money for him, which he used up by drafts on me, & kept drawing for further sums until I became dissatisfied. He kept making excuses for drawing more until I became so dissatisfied that I went to Colorado to make a settlement. On seeing him I became still more dissatisfied, & told him I should press payment. I considered my claim very insecure. As I saw no hope of recuperation in him. I thought him an honest & well-meaning man, but weak & dangerously insecure. He seemed to have very little available property, which I was about to close on, when Rockwell came forward & agreed to assume Whiting's indebtedness to me if Whiting would deed him all his property & step out. I thought well of Rockwell, & had hopes of his being able to pay, tho'

204 I considered his offer a risky one, but thought it better to accept his obligation & discharge Whiting.

22nd int. Do you know of said William A. Whiting on or about the 26th day of October, 1867, selling or transferring unto Watson B. Rockwell any stock in the Bullion Consolidated Mining Company and the Inca's Silver Mining Company? If you answer yea, state how much stock in each company was so sold and transfered, & what was the actual cash value of such stock on the said 26th day of October, 1867, & whether such sale or transfer was an absolute one, or was made on some conditions. If on conditions, state what those conditions were.

Answer to 22nd int. I know of the sale of said mining stock from Whiting to Rockwell. I think it was about that time, but am not positive; the sale was absolute. Don't know the amount of stock, nor what could have been considered the actual cash value of such stock, because its value depended on mining results, which ended disas-

205 trously. Only small sales of the stock could be made on the market, & prices were fluctuating. I was present at the sale of all of Whiting's property to Rockwell, & know that it was absolute,

on condition that Rockwell should assume & pay Whiting's indebtedness to me.

23rd int. Do you know of William A. Whiting selling or transferring unto Watson B. Rockwell, on or about the 26th day of October, any mining claims or real estate in Colorado Territory? If you answer yea, do you know the consideration of such sale or transfer? If so, state.

Answer to 23rd int. Yes; the sale of all Whiting's property to Rockwell was completed in my presence. I remember it distinctly because it was the subject of much conversation & of considerable pecuniary interest to me. The agreement was that Whiting should transfer all his property to Rockwell, on condition that Rockwell should pay Whiting's indebtedness to me.

Int. 24th. If in answer to either the 22nd or 23rd interrogato-
206 ries you say you know of a sale or transfer of stock & property & mining claims being made by said Whiting to Rockwell, state if you know at whose suggestion or solicitation such sale or transfer took place, what the consideration, if anything, was, & to whom was the consideration paid.

Answer to the 24th int. I don't remember who first suggested the sale, the consideration that Rockwell paid Whiting's indebtedness to me. If he agreed to do anything more I was not aware of it. I did not suppose that he did agree to do anything more, for the subject was thoroughly discussed before me.

Int. 25th. Do you know of Watson B. Rockwell having taken or held any stock in the Bullion Consolidated Mining Company, or the Inca Silver Mining Company, or mining claims or other property from said William A. Whiting, or in trust for said William A. Whiting, or in trust for said William A. Whiting's creditors. If you answer yea, state fully & particularly.

Answer to 25th int. No.

207 Int. 26th. Did Watson B. Rockwell ever pay you any money for William A. Whiting? If you answer yea, state when, how much, and what was the consideration, if anything, passing from Whiting to Rockwell.

Answer to 26th int. Yes; Rockwell paid me in full the amount he assumed, which was about twenty-five thousand dollars. I think it was paid about a year after Whiting's sale to Rockwell, but cannot state the period of payment with positiveness. My books were burned up in the Boston fire.

27th int. State if on or about the 26th day of October, 1867, you held any office in the Bullion Consolidated & Inca Silver Mining Companys; if yea, state what office & how long you had been holding the same.

Answer to 27th int. I held the office of treasurer in both companies from their organization. They never had any other treasurer.

208 28th int. Did William A. Whiting ever hold any office in either of these companies? If yea, what office & when, & do you know of said Whiting's using any money belonging to either of these companies? If yea, how much, & who, if any person, repaid the moneys back?

Answer to 28th int. Yes; he was agent in Colorado for both companies. Don't remember how long. He was finally removed. Know that he used money belonging to the companies, as well as property to his own use. He did not make up the deficiency. He was behind with both companies. Don't remember the amounts, as Rockwell made up the deficiencies.

Int. 29th. Do you know who was the agent of these companies in 1866?

Answer to 29th int. I think Timothy Colter was agent of the Bullion, but Whiting might have been. I don't think the Incas Co. was organized at that time.

209 Int. 30th. Do you know the following-described premises, lot No. (44), situated at the junction of the Pat Casey road with Lawrence street, in the city of Central, Gilpin County, Colorado, being forty-five feet front, and fronting on the Casey road by one hundred feet deep, together with the house & other improvements thereon? If you answer yea, state whether or not either the Bullion Consolidated or Incas Silver Mining Companies ever had any right, title, or interest therein, & how the same was acquired.

Answer to 30th int. I suppose this description is of the office building used by the two companies; if so, it belonged to the Bullion Consolidated Mining Co.

Int. 31st. Do you know anything about William A. Whiting buying the above-described premises with the money belonging to the Bullion Consolidated & Incas Mining Companies & taking the title thereto in his own name? If you answer yea, state fully.

210 Answer to 31st int. Yes; he bought it with the money belonging to the Bullion Consolidated Mining Co. & for that company, but held it as I afterwards found in his own name. He made no claim to the property.

32d int. Do you know of the Bullion Consolidated & Incas Silver Mining Companies, or either of them, ever selling the above-described premises to Watson B. Rockwell? If yea, state the consideration and who gave the deed to him for the same.

Answer to 32d int. Yes; the property was deeded to Rockwell in settlement of the indebtedness of the companies to him. I don't remember the amount, but think some $700 or $800 less than the cost of the property. Don't remember who gave the deed.

33rd int. Are you a stockholder in either the Bullion Consolidated or Incas Silver Mining Companies? If yea, how long have you been such stockholder?

Answer 33rd int. Yes; from the organization of the companies.

211 Last. Do you know any other matter or thing touching the matter in controversy in this cause that may tend to the advantage of the plaintiff in addition to what you have already stated? If yea, state the same fully and at large, as if you had been particularly interrogated in reference thereto.

To the last int. No.

Cross-interrogatories and answers thereto by the witness on the part of the defendants:

Cross-examination:

Cross-int. 1. If, in answer to the 7th, 8th, or 9th int'y, you say W. A. Whiting did draw out & use funds of the firm of J. P. Whitney & Co. for his individual use, please state whether the vouchers, checks, or drafts for such sum or sums were in any wise different in form or signature than those drawn for firm money & used for firm business, & was the banking-house of Hussey & Co. made acquainted with the

212 fact that said Whiting was using the moneys so drawn by him for his own benefit before such funds were drawn by him?

Answer to X-int. 1st. If there was any partnership between Whiting & myself, I am much surprised. My remembrance of the agreement with Whiting is, that it was specially mentioned that we were not to

be partners, & that no firm name was used, & that neither he nor I had any right to use a firm name. But I may be mistaken; my papers were burned in the great Boston fire. His papers probably exist in Colorado now, & can be examined as to facts. I suppose William A. Whiting did all the business in Colorado in his own name. I don't remember about vouchers & checks. I don't know about the knowledge of Hussey & Co. Don't think I ever said anything to them about Whiting's matters until I went out there to get a settlement with Whiting, when I think I told them not to allow Whiting to draw any more drafts on me. Am quite positive they never told me that Whiting was
213 owing them any personal sums. I had the information from Whiting himself that he was owing them.

2nd X-int. If, in answer to 22nd int., you say you know of any transfer of stock of any company by said Whiting to Rockwell, state how you know its value, how you know the terms & conditions of sale, how you know whether it was an absolute or conditional sale, & state if you know what was done with said stock, & if sold, by whom sold & at what price, & whether it was or was not agreed by said Rockwell upon such transfer of stock that he would pay off the $3,000 note of said Whiting to Hussey & Co., & was not that indebtedness a part of the consideration for said transfer?

Answer to 2nd X-int. I did not know its value. I heard the conditions of sale mentioned frequently; it was talked over a good deal. Whiting was reluctant, & held back for a while, being very sanguine about the value of his property. I was anxious to have the arrangement made, thinking Rockwell would pay me, & that Whiting
214 never would. I did not think that Rockwell was anxious to make the arrangement. I pressed strongly for it. Rockwell stated distinctly that he would not assume the indebtedness to me unless an absolute sale of the property to him was made.

The stocks, after being transferred to Rockwell (of the mining companies), were never again transferred, & I do not think proved of any value to Rockwell. Don't know anything about Whiting's $3,000 note.

3rd X-int. Do you know of said Whiting transferring or selling or in any way assigning or making over to said Watson B. Rockwell any mining property or other real estate? &, if so, state what it was, what was transferred, & whether it was an absolute sale or otherwise, & what, if any, consideration passed between them, & for what purpose the transfer was made, & whether it was or was not assigned to said Watson B. Rockwell, in trust for any purpose? If so, for what purpose?

Answer to 3rd X-int. Yes; I understood that Whiting transferred all his property to Rockwell absolutely & not in trust in consid-
215 eration of Rockwell's paying Whiting's indebtedness to me.

4th X-int. If you say Whiting did draw out money belonging to J. P. Whitney & Co. for his own use, state if you know whether he did or did not buy mining property therewith, & what was done with such mining property, & whether the same was or was not afterwards transferred to Watson B. Rockwell; &, if so, what did he do with it?

Answer to 4th X-int. I did say that Whiting overdrew on me for his own use. I don't know what he did with the money. I supposed he transferred all his property to Rockwell. Don't know what Rockwell did with the property.

J. P. WHITNEY.

The foregoing was all the evidence introduced on the trial of this cause.

And thereupon the court gave to the jury on behalf of the plaintiff the following instructions, to wit:

216 1. The court instructs the jury that defendants do not deny but what they got $2,820.93 of Rockwell about February 11, 1873, and applied it upon a note which they say they hold of W. A. Whiting. When the defendants admit the reception of the money, the burden of proof is upon them to show that the retention of it is lawful & justifiable.

This defendants attempt to do by contending that Rockwell agreed with Warren Hussey & Co., & also with Thatcher, Standley & Co., to pay the $3,000 note of Whiting. Now, if the jury believe from the evidence that the sale of the real and personal property by Whiting to Rockwell was an absolute one, & not taken in trust by Rockwell to pay Whiting's debts, then Rockwell cannot be charged with the payment of this Whiting note, unless defendants prove to your satisfaction that Rockwell promised in writing to pay such note, upon a good and sufficient consideration, because, under the statute of this State, Rockwell cannot be charged with paying the debt of Whiting, unless he promised in writing, on a sufficient consideration, unless you further find

217 from the evidence that Rockwell promised to see this note paid to Hussey & Co. previous to or at the very time, Hussey & Co. took Whiting's note, & that such promise by Rockwell was the consideration or inducement for Hussey & Co. taking the note in the first place.

2. The court instructs the jury that if they believe from the evidence that Rockwell, or Giddings for Rockwell, was induced to pay, & did pay, in to Thatcher, Standley & Co., on Feb'y 11, 1873, a sum of money to apply on Rockwell's portion of the cash (Rockwell & Company notes), upon representations of Thatcher that such notes had not been paid, when in fact such notes had been paid, & he (Thatcher) knew that fact, & if you believe that when he made these representations he knew them to be false & untrue, & Rockwell, Giddings & Mrs. Rockwell had reason to believe such statements and representations of Thatcher to be true, & relied & acted thereon—if you find these to be the facts from the evidence, Thatcher was guilty of practising a fraud upon them, and the plaintiff can now recover from defendants the money thus

218 paid, with interest thereon at the rate of ten per cent. per annum from the day of payment until now.

3. The court instructs the jury that if they believe from the evidence that Thatcher informed Rockwell of the application of this $2,820.93 to the payment of the Whiting note, & that Rockwell was not liable to pay said note, then the mere silence on Rockwell's part when notified by Thatcher of the application of the money will not amount to a ratification of Thatcher's unauthorized acts in such application. Under such circumstances there must be an affirmance of the act to bind the plaintiff, or to make the application effectual as to him.

4. The court further instructs the jury that if they believe from the evidence that Watson B. Rockwell, previous to his bankruptcy, assigned the claim now in suit to his wife, Kate, and L. C. Rockwell, one-half to each, for a valuable consideration, that this suit is well maintained in W. B. Rockwell's name for their use & benefit, notwithstanding you may believe from the evidence that Rockwell was

219 adjudged a bankrupt in May, A. D. 1876.

5. The court instructs the jury that the defendants have pleaded the indebtedness of Rockwell upon the note given by Whiting as an offset in this case, & that the burden is upon them to prove every fact

necessary to establish Rockwell's liability upon said Whiting note, & if they fail to prove every fact necessary to establish the liability of Rockwell to pay said note by a preponderance of testimony, then they have not established the offset, & the plaintiff is entitled to recover the amount of money received by Thatcher & Standley belonging to Rockwell, & interest thereon at ten per cent. per annum till the present time.

6. The court instructs the jury that the defendants cannot avail themselves of the bankruptcy of the plaintiff if they believe from the evidence that the money claimed was assigned to the said Kate Rockwell & L. C. Rockwell four months before Rockwell's petition in bankruptcy was filed, & even if there had been no assignment of this
220 claim the defendants could not avail themselves of the bankruptcy if it appeared from the evidence that the assignee in bankruptcy expressly consented that the plaintiff might continue to prosecute the claim in his own name in this court.

7. The court instructs the jury that if Thatcher was the owner of the Whiting note at the time of the commencement of this suit, then it was no defence to this suit, even if you believe from the evidence that Rockwell is liable to Thatcher for the amount of the note, unless the plaintiff subsequently to the application of the money by Thatcher on the Whiting note assented thereto & ratified the application of the same.

To the giving of each & all of which instructions the defendants, by their counsel, then & there excepted.

And thereupon the court gave to the jury on behalf of the defendants the following instruction:

The court instructs the jury that if they believe from the evi-
221 dence that the plaintiff was liable to the defendants for the payment of a certain note, & that the money sued for was endorsed on the note on which the plaintiff was liable, & afterwards the defendant Thatcher and plaintiff had a settlement together after plaintiff knew of the disposition of the money, & plaintiff then assented to such disposition of the money, & agreed that such disposition should stand, then that constitutes an accord & satisfaction of the debt, & plaintiff cannot recover.

And the defendants, by their counsel, then & there asked the court to also give to the jury the following instructions, to wit:

1. The court instructs the jury that a chose in action, or right to recover in a suit, cannot be assigned except in writing, & the consideration between the plaintiff & his wife do not constitute an assignment of one-half of the claim to the witness Kate Rockwell, plaintiff's wife, & the legal title to said one-half of said claim against defendants remained in the plaintiff, & if the plaintiff became a bankrupt & his assignee was appointed, then the title vested in the assignee, and
222 the plaintiff cannot recover.

2. The court instructs the jury that in this case the plaintiff, by his pleadings in the case, admits that he has filed his petition in bankruptcy, & that the assignee of the plaintiff was duly appointed under such proceeding in bankruptcy. And the court further instructs that at the time of the appointment of such assignee the right of action in this case, if any existed, vested in the assignee, & under the pleadings in this case the plaintiff cannot recover unless such debt had been duly assigned to some one before the commencement of such pro-

ceedings in bankruptcy, & such assignment must be an absolute assignment, without any right remaining in the plaintiff, & could not be made by parole, but must be in writing.

3. The court instructs the jury that if they believe from the evidence that the plaintiff, after the commencement of the suit, filed his petition in bankruptcy & was adjudged a bankrupt & an assignee in bankruptcy was appointed, then the plaintiff cannot recover in this
223 action, for if he had any legal claim against the defendants at the time the assignee in bankruptcy was appointed, the same vested in the assignee in bankruptcy.

4. The court instructs the jury that if the' believe from the evidence that since the commencement of this suit the plaintiff has filed his petition in bankruptcy & has been adjudged a bankrupt, & his assignee has been appointed, then the plaintiff cannot recover in the action of the defendants, although the jury may believe from the evidence that the plaintiff told his wife she might have one-half of the claim sued for in this case if it was collected, & although the jury may also believe from the evidence that plaintiff was indebted to his wife.

5. The court instructs the jury that if the defendants were indebted to the plaintiff, & that the plaintiff had assigned such claim to L. C. Rockwell & Kate Rockwell, & that after such assignment he brought suit against the defendants & was subsequently adjudged a bank-
224 rupt & an assignee was appointed, that the fact of such bankruptcy & the appointment of the assignee having been plead in the case, the assignee of such claim must prosecute this suit in the name of the assignee & not in the name of the plaintiff.

But the court refused to give these instructions to the jury; to which decision of the court in refusing to give said instructions, & each of them, to the jury the defendants, by their counsel, then & there excepted.

And thereupon the jury rendered a verdict against the defendants, as follows: "We, the jury, find the issues for the plaintiff and assess his damages at forty-one hundred dollars ($4100.00).

"GEO. A. PUGH, *Foreman.*"

Whereupon the defendants, by their counsel, then & there moved the court to set aside the verdict so rendered & grant a new trial of this cause, & filed the following reasons in writing for said motion, to wit:

STATE OF COLORADO,
County of Gilpin, ss:

WATSON B. ROCKWELL
vs.
225 J. A. THATCHER ET AL.

And now comes the defendants, by H. M. & W. Teller, their attorneys, & move the court to set aside the verdict in this case & grant a new trial for the following reasons:

The court erred in allowing the evidence of Mrs. Kate Rockwell, wife of plaintiff.

1. The court erred in allowing the introduction of the so-called assignment of the one-half of the claim by the plaintiff to L. C. Rockwell.

2. The court erred in refusing the non-suit asked for by defendants.
3. Because the court erred in allowing proof of the so-called assignment of the one-half of the claim to Mrs. Kate Rockwell, wife of the plaintiff.
4. Because the court erred in admitting improper evidence to the jury.
5. Because the court erred in excluding proper evidence offered by the defendants.
6. Because the court erred in instructing the jury on the part of the plaintiff.
7. Because the court erred in refusing to instruct the jury as asked by the defendants.
226 8. Because there is no proof to support the verdict.
9. Because the plaintiff, being a bankrupt, cannot maintain this action.
10. Because the verdict is informal & uncertain.
11. Because the verdict is against both defendants, & there is no evidence that Standley had any connection with the transaction or received the money of the plaintiff.
12. Because the evidence shows that the plaintiff has no title to the debt, if any debt did exist, but the same is vested in the assignee in bankruptcy.

H. M. & W. TELLER,
Att'ys for Def'ts.

But the court denied the motion and gave judgment on the verdict against the defendants; to which decision of the court, in denying said motion of defendants & rendering judgment against them, the defendants, by their counsel, then & there excepted.

And, forasmuch as the matters above set forth do not fully appear of record, the defendants tender this their bill of exceptions, & pray that the same may be signed & sealed by the judge of this
227 court pursuant to statute. It is done accordingly, this 22nd day of October, A. D. 1877.

WM. E. BECK, [L. S.]
Judge.

Filed October 26th, 1877. Chase Withrow, clerk.

Supreme court of the State of Colorado, Thursday, November 20th, A. D. 1879.

Court met this day at the hour of ten (10) o'clock a. m., pursuant to adjournment.

Present, honorable Henry C. Thatcher, chief justice; honorable Samuel H. Elbert, associate justice; honorable Wilbur F. Stone, associate justice; David J. Cook, esq., sheriff of Arapahoe County, by James A. Miller, bailiff of said court; Keyes Danforth, clerk.

And the following proceedings (inter alia) were had and entered of record in said court, to wit:

228 JOSEPH A. THATCHER ET AL., APPELLANTS, *vs.* WATSON B. ROCKWELL, APPELLEE. } # 479.

Appeal from district court of Gilpin County.

At this day this cause coming on to be heard upon the rehearing

heretofore allowed by this court herein, and the same having been argued by counsel and submitted to the consideration and judgment of the court, and the court being now fully advised in the premises, it is ordered, adjudged, and decreed by the court that the decree herein of the district court in and for the county of Gilpin be, and the same is hereby, affirmed and stand in full force and effect; and that said appellee do have and recover of and from said appellants his costs in this behalf expended, to be taxed, and that he have execution therefor. And let the opinion filed herein on the 28th day of February, A. D. 1879, stand as the opinion of the court upon the rehearing of this cause.

Copy of bond.

229 Know all men by these presents that we, Joseph A. Thatcher & Joseph Standley, of Central City, as principals, and Otto Sauer and Frank C. Young, also of Central City, as sureties, are held and firmly bound unto Watson B. Rockwell in the sum of seven thousand dollars; to the payment of which sum, well & truly to be made, we bind ourselves, our heirs, executors, & administrators firmly by these presents. Sealed with our seals & dated this 10th day of January, 1880.

The condition of this obligation is such that whereas the said Watson B. Rockwell did, on the 20th day of Nov., at a special term of *of* the supreme court of Colorado, in a case then pending, in which the said Joseph A. Thatcher & Joseph Standley were appellants & the said Rockwell was the appellee, procure an affirmance of a judgment theretofore rendered by the district court of Gilpin County for the sum of forty-one hundred dollars damages and costs of suit against the said Thatcher & Standley, from which judgment of affirmance the said Thatcher & Standley have appealed to the Supreme Court of the United States, & are about to remove the said cause by appeal or writ of error:

230 Now, if the said Thatcher & Standley shall prosecute the said writ in the said Supreme Court of the United States with effect, and shall pay the amount of said judgment, interests, & costs in said court, & shall answer all damages & costs, including just damages for delay, if they fail to make the plea good, then this obligation to be void; otherwise to be & remain of full force & effect.

JOSEPH A. THATCHER, [SEAL.]
By F. C. YOUNG, [SEAL.]
His Attorney in Fact.
JOSEPH STANDLEY. [SEAL.]
OTTO SAUER. [SEAL.]
FRANK C. YOUNG. [SEAL.]

STATE OF COLORADO,
Gilpin County:

Frank C. Young & Otto Sauer, being each duly sworn, says he is worth more than seven thousand dollars over & above all debts or liabilities incurred by him & over & above property exempt from execution.

Sworn to before me this tenth day of January, 1880.

WM. F. ALLEN,
Notary Public.

Approved Jan. 12, A. D. 1880.

231 HENRY C. THATCHER,
Chief Justice of Colorado.

Filed Jan. 12, 1880. Keyes Danforth, clerk supreme court.

Copy of precipe.

JOSEPH A. THATCHER ET AL., APPELLANTS,
vs.
WATSON B. ROCKWELL, APPELLEE. } # 479.

The clerk of the supreme court will make up record in above cause, containing: 1, placita; 2, summons; 3, complaint; 4, pleas; 5, order allowing supplemental pleas; 6, sup. pleas; 7, replication; 8, rejoinder; 9, record of trial; 10, judgment; 11, order allowing appeal & order showing the filing of appeal bond and approval thereof; 12, bill of exceptions; and in supreme court, the judgment of the court and copy of supersedeas bond & the approval thereof.

H. M. & W. TELLER,
Att'ys for Pl'ff in Error.

Filed Jan'y 12, 1880. Keyes Danforth, clerk.

232 STATE OF COLORADO,
Supreme Court, ss:

I, Keyes Danforth, clerk of the supreme court of the State of Colorado, do hereby certify that the foregoing transcript contains true and complete copies of the following papers, to wit: 1, placita; 2, summons; 3, complaint; 4, pleas; 5, order allowing supplemental pleas; 6, supplemental pleas; 7, replication; 8, rejoinder; 9, record of trial; 10, judgment; 11, order allowing appeal and showing the filing of the appeal bond and approval thereof; 12, bill of exceptions: and in the supreme court, the judgment of the court and copy of bond and approval thereof, all in case lately pending in said court wherein Joseph A. Thatcher and Joseph Standley were appellants and Watson B. Rockwell was appellee, as appear from the records & files now in my office.

Witness my hand and the seal of the supreme court, at Denver, this 14th day of January, A. D. 1880.

[SEAL.]

KEYES DANFORTH,
Clerk Supreme Court of Colorado.

Cost of record: 610 folios, 20c., $122.00; certificate & seal, 1.00= $123.00.

233 *Citation U. S. court.*

THE UNITED STATES OF AMERICA,
District of Colorado:

The United States of America to Watson B. Rockwell, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, D. C., on the 2nd Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Colorado, wherein Joseph A. Thatcher & Joseph Standl'y are plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Henry C. Thatcher, chief justice of the supreme court of the State of Colorado, this 12th day of January, in the year of our Lord one thousand eight hundred and eighty.

HENRY C. THATCHER,
Chief Justice, &c.

234 *Proof of service.*

THE UNITED STATES OF AMERICA,
District of Colorado, Northern Division, ss:

On this 23rd day of January, A. D. 1880, personally appeared James M. Lomery, before me, the subscriber, a clerk of the circuit court of the United States for the district of Colorado, and makes oath that he delivered a true copy of the within citation to L. C. Rockwell, esq., attorney of Watson B. Rockwell.

JAMES M. LOMERY.

Sworn to and subscribed before me, this second day of March, A. D. 1880.

[SEAL.] EDWARD F. BISHOP,
Clerk District Court U. S., N. D. Dist. *of Col.*
By
Deputy Clerk.

Gen. No. . court of the United States, district of Colorado. Joseph A. Thatcher, Joseph Standly, plaintiff' in error, vs. Watson B. Rockwell, dofendant in error. Citation. Filed in court of the U. S. this day of , A. D. 18 . , clerk, by , deputy clerk. , attorney for plaintiff' in error.

(Indorsement on cover:) No. 693. Joseph A. Thatcher and Joseph Standley, plaintiffs in error, vs. Watson B. Rockwell. Colorado sup. court. Filed 16th October, 1880.

No 693

UNITED STATES OF AMERICA.

IN THE

SUPREME COURT

OF THE

UNITED STATES,

OCTOBER TERM, 1881.

JOSEPH A. THATCHER AND JOSEPH STANDLEY,
Plaintiffs in Error,

—*vs.*—

WATSON B. ROCKWELL,
Defendant in Error.

MOTION BY DEFENDANT IN ERROR TO DISMISS.

J. Q. CHARLES,
J. B. BELFORD,
Attorneys for Defendant in Error.

Collier & Cleaveland, Printers, Denver.

UNITED STATES OF AMERICA.

IN THE

SUPREME COURT

Of the United States,

OCTOBER TERM, 1881.

JOSEPH A. THATCHER AND JOSEPH STANDLEY,
Plaintiffs in Error,

—*vs.*—

WATSON B. ROCKWELL,
Defendant in Error.

This is supposed to be a writ of error sued out from the Supreme Court of the State of Colorado from a judgment affirmed by that tribunal February 27th, 1879.

The facts may be briefly stated, as follows:

On June 10, 1875, W. B. Rockwell, now defendant in error, sued plaintiffs in error in the District Court of the Second Judicial District, in the late Territory of Colorado sitting, in and for Gilpin County, in an action of assumpsit

under common law pleadings. The declaration contained a special count and the ordinary common counts.

The special count was adjudged insufficient on demurrer, and trial was had on common counts and certain pleas, embracing general issue, pleas of payment, set-off and a certain supplemental plea which was filed March 26th, 1877, by leave of the Court long after the cause had been put at issue on the above pleadings. This last plea set up that since the action was commenced, to wit, April 26th, 1876, plaintiff was adjudged a bankrupt under the act of Congress of March 2d, 1867, in the United States District Court of the Southern District, in the State of Illinois, the appointment of qualification of an assignee in bankruptcy, the execution by the register in bankruptcy of the assignment, advertisement by assignee, filings for record in the office of the clerk and recorder in the County of Gilpin, and the conveyance by operation of law of all rights of property and choses in action of the said plaintiff to said assignee, and that right of action was wholly in George Fisher, the assignee, wherefor the defendants prayed judgment whether plaintiff could longer prosecute said action.

To this plea plaintiff replied admitting the adjudication in bankruptcy, the appointment and qualification of the assignee in bankruptcy, the conveyance by the register to the assignee, and the recording of the same. But alleged the claim which was the subject matter of this suit did not pass to such assignee under such conveyance, nor otherwise, because long before the petition for adjudication in bankrupcty was filed, to wit, in November, 1875, the plaintiff for a good and valuable consideration sold and assigned said claim in suit to Kate Rockwell, his wife, and L. C. Rockwell, who were now the owners thereof, and plaintiff was only suffering them to prosecute that suit in his name. That the assignee was fully informed of such assignment, and neither had nor made any claim to it, nor

interest in the said claim, and that such suit was then being prosecuted with his knowledge and consent in the name of W. B. Rockwell, the bankrupt. Defendants filed a rejoinder to said replication, denying the assignment to Kate and L. C. Rockwell.

September 27th, 1877, trial was had on all the issues, and a verdict returned for plaintiff for $4,100, which was followed by a judgment, which defendants removed by appeal to the Supreme Court of the State of Colorado for review. And on February 27th, 1879, that Court affirmed the judgment, and on May 9th, 1879, granted a re-hearing, and on November 7th, 1879, the Court announced its former decision to stand as the opinion of the Court.

January 12th, 1880.—Thatcher and Standley filed a bond in the Supreme Court of the State of Colorado reciting "that they had appealed from the decision of that Court, affirming the judgment from the District Court of Gilpin County, and are about to remove that judgment to this Court by appeal or writ of error."

On the above facts the following motions are predicated:

Now comes the defendant in error, or appellee, for the purpose of this motion, and this motion only, and moves this Court to strike this cause from the docket of this Court for want of jurisdiction thereof. But in case this Court assumes jurisdiction, then, and in that case, to affirm the judgment with damages, under rule 6 of this Court, and for these motions the following reasons are assigned:

First.—Because this action is here on appeal, and not by writ of error, and no appeal lies in such cases.

Second.—Because there is no sufficient citation appearing in the record. The citation is signed by Henry C. Thatcher, Chief Justice of the Supreme Court of the State of Colorado, and he could not allow an appeal, neither did he allow a writ of error.

Third.—Because a citation should have been signed by one of the Justices of this Court after the allowance of a writ of error by him.

Fourth.—Because if this action has to be treated as a writ of error, then no writ of error was allowed by a Justice of this Court, nor issued by authority of law, no such writ appearing in the record.

Fifth.—Because the Court has no jurisdiction of this cause. There was no decision of any federal question involved in the Court below. There was not drawn in question any title, right, privilege or immunity claimed under the constitution or statute of, or commission held, or authority exercised under the United States or any statute thereof.

And, if any such title, right, privilege or immunity was claimed or set up, no decision was rendered nor given against such title, right, privilege or immunity so specially set up.

Sixth.—Because if this Court has jurisdiction of this action, it is manifest from the record the writ was prosecuted for delay only. That the question on which the jurisdiction depends is so frivolous as not to need further arguments.

ARGUMENT.

I.

It is the appeal bond which stays the proceedings in the Court below, and to make that a valid and binding instrument it must correctly recite the purpose for which it was given. The language of the appeal bond is, "from which judgment of affirmance the said Thatcher and Standley have appealed to the Supreme Court of the United States, and are about to move the said cause by appeal or writ of error."

The above language implies this was intended as an appeal. It is true the citation admonishes Rockwell to appear in this Court pursuant to a writ of error filed in the clerk's office of the Supreme Court of the State of Colorado, wherein Joseph A. Thatcher and Joseph Standley are plaintiffs in error, and you are defendant in error. But this Court cannot notice this recitation in the citation. It is not good if this is an appeal.

II.

It cannot be considered because this is not a writ of error.

III.

There is no writ of error in this record, and this omission is fatal. "The original writ of error should always be returned to the Supreme Court with the transcript of record."

Mussina *vs.* Cavzos, 6 Wall., 355.
Truax *vs.* Watson, 13 Otto., 276.

IV.

"A writ of error to a State Court is never allowed as a matter of right. The practice is to submit the record of the State Court to one of the Justices of this Court, whose duty it is to ascertain whether any question cognizable here on appeal was made and decided in the proper Court of the State, and whether the case on the face of the record will justify the allowance of the writ."—

Twitchell *vs.* The Commonwealth, 7 Wall., 321.
Gleason *vs.* Florida G., 8 Wall., 779.

This Court has no jurisdiction of this case under section 709 of Revised Statutes of the United States, page 132, because no title, right, privilege or immunity is claimed under any statute of, * * or authority exercised under the United States.

The supplemental plea asked that the prosecution of the suit be stayed until the name of Geo. Fisher, the assignee, be substituted as plaintiff. The only right claimed was that to have the assignee substituted vice W. B. Rockwell, who had become bankrupt after the action was commenced. This was not a right material to their defense. Neither had the Court a right to allow the filing of the plea. It could not have forced, nor compelled the assignee to become a party. That was optional with him. The Court undoubtedly erred in permitting the supplemental plea to be filed, but the error was at the request of plaintiffs in error. Hence, not noticeable by this Court—

Eyster *vs.* Gaff, et al., 9 Otto, 521, and cases there cited.

The plea attempted to raise the issue that the District Court could not proceed without the assignee was before it as a party. He refused to become such, therefore the Court should have refused to let the plea be filed. The bankruptcy of plaintiff was a question defendants could not raise.

It could only come from assignee. It required the assignee to present that question, because in that way, and that alone, could an issue be made. The law requires two parties before a Court before it can adjudicate. The State Court was not divested of its jurisdiction by the bankruptcy of plaintiff. Decision of State Court in this case, 4 Colorado, 375.

Clafton *vs.* Houseman, assignee, 3 Otto, 130.
Wooddail Adrax *vs.* Austin, 44 Ga., 18.
Austin *vs.* Markham, 44 Ga., 161.

But, if the plea was properly filed, it presented an issue of fact to be determined like any other; we confessed the bankruptcy, but avoided its effect by replying an assignment of claim in suit to third parties long before petition in bankruptcy was filed. This was a fact to be decided by the jury, like any other fact. Hence, no question was presented under section 709 of the Revised Statutes of the United States. Plaintiffs in error joined issue on the plea, and went to trial expecting to abide the result of the findings of the jury until the Supreme Court of the State for the first time raised the question of the jurisdiction of the State Court, but then sustained it and affirmed the judgment. The Court below decided no question adversely to plaintiffs in error on which the jurisdiction of this Court depends. Hence, this writ of error must be dismissed—

Railway Co. *vs.* Rock, 4 Wall., 117.
Parmelee *vs.* Lawrence, 11 Ibid., 36.
Hurley *vs.* Street, 14 Wall., 85.
Crocket *vs.* Vose, 14 Wall., 5.
Palmer *vs.* Marston, Ibid., 10.
Steines *vs.* Franklin Co., Ibid., 15.

J. Q. CHARLES,
J. B. BELFORD,
Attorneys for Appellee.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1881.

JOSEPH A. THATCHER AND JOSEPH STANLDEY,
Plaintiffs in Error,

—*vs.*—

WATSON B. ROCKWELL,
Defendant in Error.

In error in the Supreme Court of the State of Colorado.

The defendant in error files his motion in this court to be heard the 26th instant, for a dismissal of the cause for want of jurisdiction in this court, and among other reasons alleges that there is no writ of error sent with the transcript of record in this cause.

From the transcript of the record sent to the court, it appears from the citation dated January 12th, 1880, on pages 79 and 80 of said transcript, folio 233, the writ of error was filed in the Supreme Court of Colorado, and in obedience thereto the clerk sent the transcript of the record in due time, that is, October 16th, 1880, but failed to send the writ of error. The omission of the writ of

error having escaped the notice of counsel until defendant in error moved a dismissal for want of the writ, and for other causes assigned in his motion, the plaintiffs in error now file the motion to be allowed to file an additional, or supplemental record. The motion is as follows:

UNITED STATES OF AMERICA.

SUPREME COURT OF THE UNITED STATES.

JOSEPH A. THATCHER AND JOSEPH STANDLEY,
Plaintiffs in Error,
vs.
WATSON B. ROCKWELL, Defendant in Error.

Now come the said Joseph A. Thatcher and Joseph Standley, by Henry M. Teller, their attorney, and show to the court that on the 12th day of January, 1880, they deposited with the clerk of the Supreme Court of the State of Colorado a certain writ of error, duly allowed by Henry C. Thatcher, chief justice of the supreme court of said state, wherein Joseph A. Thatcher and Joseph Standley were named as plaintiffs in error, and Watson B. Rockwell, defendant in error. That the clerk of said Supreme Court of the said State of Colorado, in making up the record of said case to be filed in the Supreme Court of the United States, by inadvertence omitted from such record the said writ of error, as well as the opinion of the Supreme Court of the State of Colorado, which omission was not noticed by plaintiff's attorneys until since the commencement of the first term of court. Now, therefore, the plaintiffs in error move this honorable court to be allowed to file with, and in addition to, the transcript of the record heretofore filed, a certified copy of the opinion of the Supreme Court of Colorado in said cause, and the writ of

error issued and deposited with the clerk of said Supreme Court of Colorado, as heretofore stated, as a supplemental record in the case.

H. M. TELLER,
Atty. for Plaintiffs in Error.

BRIEF.

This court may proceed without the writ in certain cases, as was held in the case of Mussina vs. Cavazos, 6 Wall., pages 360 and 391.

The writ has accomplished its purpose, and if the same was lost or destroyed, the court might still proceed without it, as was done in the case of Ableman vs. Booth, 11 How., p. 204.

In this case the plaintiffs in error are prepared to file the original writ sent here by the clerk of the Supreme Court of Colorado, with certificate of the clerk that by inadvertence it was not sent with the transcript of the record.

The usual course in a case of this kind is doubtless to suggest a diminution, and ask for a certiorari, but it cannot be necessary to command the clerk to do that which he has already been commanded, but failed to do, and the court will allow the correction to be made without a writ

of certiorari, if the clerk voluntarily offers to make good his omissions or errors.

See Woodward vs. Brown, 13 Peters, 1.

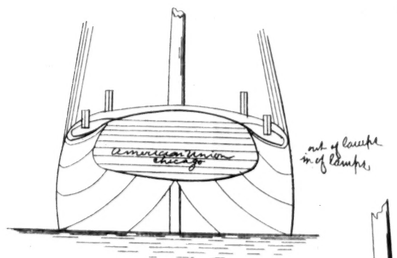
The writ has accomplished its purpose. Has secured a transcript of the record on the files of this court within the life of the writ, and the rights of the plaintiffs in error cannot be defeated by its absence from the files, if the court is satisfied of its existence.

Mussina vs. Cavazos, 6 Wallace, p. 360.

H. M. TELLER,
Attorney for Plaintiffs in Error.

Exhibit 'A' of
Wm N Bates Deposition
John C Phillips
Notary Public

Plan E.

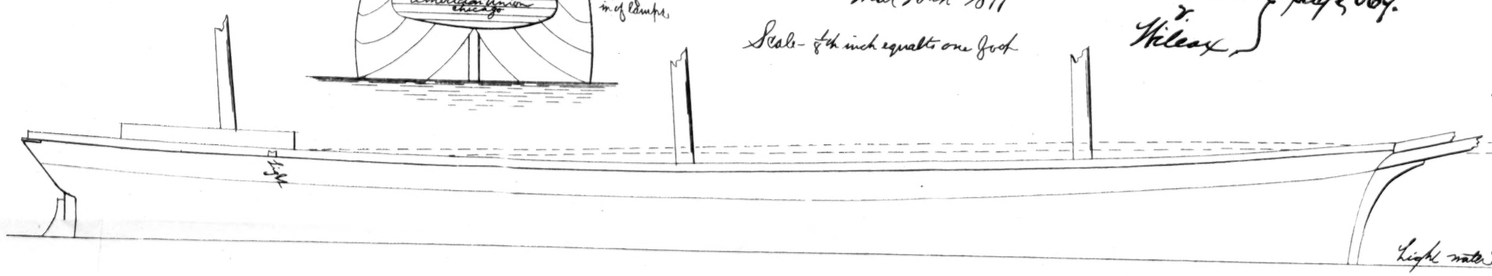


end of counter
end of dumps

Drawings from measurements taken from
The Schooner American Union of Chicago
By Wm N Bates ship Builder
March 30th 1877
Scale - 4th inch equals one foot

No. 245
Winslow
v.
Wilcox
} page 369.

Light, one foot
Mast
25 ft high on 4 mile
57 " " " 4 "
66 " " " 4 "
85 " " " 4 "
119 " " " 4 "



Lower line of lights
Shadow of boom
Light mast Line
Shadow of rigging, timber heads
Shadow of anchor line
Light over boom
Light over boom
Shadow of anchor stock
Shadow of rigging and timber heads
Shadow of hull
Inside line of lights

Mast (2 masts)
30 ft from stern
32 feet

10 mile 185 ft
Width of shadow of hull